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# REPORTS OF CASES

DECIDED IN

Gt. Brit. Parl.

## THE HOUSE OF LORDS,

UPON

## APPEAL FROM SCOTLAND,

FROM 1757 TO 1784.

VOL. II.

BY

THOMAS S. PATON, Esq.

ADVOCATE.

BEING THE CONTINUATION OF THE  
REPORTS OF MESSRS. CRAIGIE AND STEWART.

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Wilson, William, & Co.	Alexander Elliot, and Others	411
York Buildings Company	Dr. Fordyce	500
Yorston	Dr. Stewart Thriepland	496
	Andrew Wauchope, Esq.	595
	M'Neil or Morison	276

CASES  
DECIDED IN  
THE HOUSE OF LORDS,  
ON APPEAL FROM  
. THE COURTS OF SCOTLAND.

WALTER GROSSET, Esq., Inspector-General of His Majesty's Customs at the Port of Leith, } *Appellant* ;  
THOMAS OGILVY of Dundee, in the County of Forfar, Merchant, - - - - } *Respondent*.

House of Lords, 16th February 1753.\*

**CUSTOMS**—Act 3 Anne, c. 13, and 9 Geo. II.—Indemnity Act, 18 Geo. II.—Tobacco was imported from the Plantations abroad, by merchants in Leith, upon which the usual duties were paid. Afterwards it was exported, and, in terms of the act in such cases, a drawback of the whole duty was obtained, and the goods exported under a certificate that they were for foreign export. After the ship proceeded to sea the tobacco was clandestinely relanded: Held that the Indemnity Act, 18 Geo. II., did not apply to such a case, and that the tobacco was forfeited, and the penalties attached.

INDIRECT practices had been carried on for some time at Leith, by privately relanding tobacco and other foreign goods, after they had been shipped for exportation, upon certificates obtained from his Majesty's Customs, and drawbacks of the duty had been allowed thereon.

The defendant was accused as concerned in the unlawful

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\* This, and the next case, omitted in the former Part, at their proper dates.

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relanding of such certificate-goods ; and Information was filed in the Court of Exchequer against him, setting forth, that 46 hogsheads of plantation tobacco were imported by certain merchants in Leith, from beyond seas, for which certain duties were paid : and that the said merchants in Leith did afterwards procure proper certificates from the Custom-house officers, for the purpose of again exporting the tobacco to parts beyond seas, upon which certain drawbacks of the duty formerly paid were allowed ; amounting to £879. 8s. 7d. being the whole of the duty ; and that the said parcels of tobacco so shipped were afterwards unshipped, and relanded, without any distress, or for the purpose of saving it, but to evade the law in these respects.

The Act 3 Anne, c. 13, was founded on, which sets forth, § 16 : " And whereas by the laws of this realm, every person " is entitled to a drawback of part of the duties paid or " secured at the importation thereof ; and it hath been found " by experience, that great quantities of such tobacco, and " other foreign goods, after they have been shipped for ex- " portation, have been privately relanded in this realm ; and " the remedies already provided by law have not been suf- " ficient to obviate a practice so very prejudicial to her " Majesty's revenue, and to all fair and honest traders in such " goods : For the better prevention whereof for the future, " be it further enacted, by the authority aforesaid, That from " and after the 27th day of March 1710, in case any tobac- " co, or other foreign goods, contained, or specified in any " certificate, whereupon any such drawback is to be made, " or whereupon any debenture is to be made for any such " drawback, *shall not be really and bona fide* shipped and " exported (the danger of seas excepted), or shall be landed " again in any part of Great Britain, unless in case of dis- " tress to save the goods from perishing, which shall be " presently made known to the person or persons who are " or shall be appointed by her Majesty to manage her cus- " toms, or principal officers of the port; then not only all " such tobacco and other *certificate-goods* shall be forfeited " and lost, but also the person or persons (being the ex- " porters, or any others,) who shall bring back, or conceal, " or procure to be relanded, such tobacco, or other certificate " goods, shall be forfeited and lost ; but also the person, or " persons (being the exporters or any others), who shall bring " back, or cause to procure to be relanded, such tobacco, or " other certificate-goods, or any of them, in any part of Great

" Britain, or be assisting, or otherwise concerned, in the  
" unshipping of the same, or to whose hands the same shall  
" knowingly come after the unshipping thereof, or by whose  
" privity, knowledge, or direction, the said tobacco, and  
" other goods, or any part thereof, shall be so relanded,  
" shall forfeit double the amount of the said drawback for  
" such goods, together with the vessels, and boats, and all  
" the horses, or other cattle and carriages whatsoever, made  
" use of in the landing, removing, carriage, or conveyance  
" of the same; one moiety of all which penalties or for-  
feitures shall be to the use of her Majesty; and the other  
" moiety to him or them that shall inform, seize, or sue for  
" the same; to be recovered by bill, plaint, or information,  
" in any of her Majesty's Courts of Record at Westminster,  
" or in the Court of Exchequer of Scotland, at any time  
" within five years." By 17th section the officer of customs  
conniving at any such fraud is to suffer deprivation, and six  
months' imprisonment.

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The defendant appeared, and, instead of denying the several charges in the Information, he pleaded the Act 18 Geo. II. for indemnifying persons who have been guilty of the unlawful importing, landing, or running, of prohibited and uncustomed or other goods,—which act sets forth:—“That all and every his Majesty's subjects of this his Majesty's realm of Great Britain, who before the first day of May in the year of our Lord 1745, had incurred any penalty or forfeiture, in, by or for, the clandestine running, unshipping, concealing, or receiving, any prohibited goods, wares, or merchandizes, or any foreign goods, liable to the payment of the duties of customs and excise, or either of them, and who were, or might be subject to any information, or other prosecution whatsoever, for the penalties for the running, landing, unshipping, concealing or receiving thereof, or for landing any goods, without the presence of an officer, should be, and were, by the authority of the said act, acquitted, indemnified, released, and discharged, against his said Majesty, his heirs and successors, and all and every other person and persons, bodies politic and corporate, and any officer or officers of the Customs and Excise, any and every of them, of and from all the said offences (not excepted in the said act), and of and from all penalties, forfeitures, indictments, outlawries, convictions, and judgments (not therein after excepted), incurred, had or given, or that might arise, or accrue, for

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" or by reason or means of any of the said offences, or other matters, or things, in the said act mentioned or expressed."

The defendant further pleaded, That he was a subject of his Majesty's realm of Great Britain, and entitled to the benefit of the said act, as an indemnity against the penalties, for the offences in the act first above quoted.

The Barons of Exchequer in Scotland were equally divided; but the Chief Baron having given his casting vote for the defendant's plea, verdict went for him.

A writ of error to Parliament was taken against this judgment.

*Pleaded for the Plaintiff* :—The defendant, by pleading the Act of Indemnity, hath admitted the several charges in the Information—namely, that he was concerned in relanding the tobacco in question, after the proper certificates for exportation, and a drawback of the duties allowed thereon, had been obtained. The relanding was not made known to the officers of customs, nor occasioned by distress, and consequently he had become liable to all the penalties imposed by the act of the 3d of Queen Anne, unless those penalties shall appear to be released by the Indemnity Act of the 18 Geo. II. That the relanding of uncustomed or prohibited goods, and the relanding of certificate-goods, are separate and distinct offences. The term landing and relanding are differently applied. The former being used to express the offence in unshipping customizable or prohibited goods ; and relanding being applied only to *certificate-goods*. The Act of Indemnity of 18 Geo. II. only applies to and pardons all forfeitures for the running, landing, and shipping of prohibited goods ; but certificate goods are neither prohibited goods, nor goods liable to the payment of duties, as they have once been legally imported and landed, and consequently are not prohibited. Nor will the indemnity granted by the act, in respect of goods not landed in presence of an officer, extend to the case of *certificate-goods* ; because the certificate of such goods is granted upon the express condition of exportation.

*Pleaded for the Defendant* :—The offence charged in the Information is the landing and unshipping of tobacco, which having been once duly imported, the duties paid, and afterwards entered for exportation, with a certificate, and drawback allowed, is an offence contrary to, and prohibited by law. The tobacco, therefore, on the case stated by the Information, was a prohibited commodity, and by the landing thereof, in the

manner stated and charged in the Information, the respondent was liable to the consequences and penalties for landing and unshipping of prohibited goods, contrary to act of Parliament; but he pleads the Indemnity Act, because it is from such penalties and forfeitures, as well as from all prosecutions on account thereof, that persons are expressly indemnified and acquitted by the Act 18 Geo. II. If the landing of tobacco exported by certificate was not within the words of the statute, it was within the intent and meaning of the legislature.

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The question proposed to the whole judges was:—

“ Whether the offence of being assisting, or concerned in the unshipping and in landing of the tobacco, charged in the Information in this case, is released, or discharged, by the act of Parliament, 18 Geo. II.? ”

The Chief Justice (Willis) delivered the opinion of the judges thus:—

“ I will consider it first, merely on this statute, (18 Geo. II.) independent of the 9 Geo. II.; and will afterwards consider whether that statute affords any argument in behalf of the defendant ? ”

“ Offences proper to be taken into consideration.”

“ 1. The offence of running or landing prohibited goods.  
2. The offence of running or landing goods, liable to the payment of customs and duties, before the customs or duties are paid.  
3. The offence of relanding or landing again goods, on which a drawback has been allowed, upon their being entered for exportation.”

“ And we are of opinion, that the two first offences are discharged and pardoned, by the 18 Geo. II.—But the last is not, which is the offence charged in the Information, and is confessed by the defendant's demurrer.”

“ The reasons for our opinion are:—We think that these three offences are very distinct and different from each other.”

“ 1. As they are always described by different words.  
2. As they are made offences by different acts of Parliament, and different penalties are inflicted on them.  
3. As they are in their nature very distinctly different from each other.”

1. They are described by different expressions.

“ The first is described the *running or landing prohibited goods.*”

“ The second, the running, unshipping, or landing goods liable to the payment of duties, before the duties are paid or secured, and which, for shortness sake, is generally called, “ *the running or landing uncustomed goods.*”

The third, which is the present offence, on the 8 Anne, in this

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and all the other statutes, which make any mention of it, it is the landing again, or relanding goods not prohibited, for which the duties have been paid, but which duties have been paid back again, on their being entered for exportation, and on an express agreement that the goods shall be *bona fide* exported, and that they shall not be relanded in any part of Great Britain, that constitutes the offence; and it is usually called, *the relanding of certificate goods*; because the drawbacks are paid, or allowed on producing proper certificates."

"2dly, Those are made offences by different acts of Parliament, and different penalties are inflicted upon them, as appears by the two acts which have been cited by the counsel, particularly by the 8 Anne, by which, if persons are guilty of the offence in question, the goods themselves are forfeited, the offenders to pay double the amount of the drawback, and to suffer six months imprisonment."

"3dly, When those offences come to be considered, they are as different in their nature as possible, the last is much more heinous than either of the others."

"The two first are not *mala in se*, but only *mala prohibita*; but the offence under your Lordships' consideration, is not only *malum prohibitum*, but plainly *malum in se*."

"It is receiving money of the crown, on an agreement to do a particular thing, and then not doing it; but acting clandestinely, in direct contradiction to the agreement, which is a cheat on the Crown and the public; and is generally attended with something worse; for the person who commits this offence is generally perjured likewise."

"For by 4 and 5 Wm. and Mary, c. 15 and 11: The owner of the goods, or the person who is to be concerned in the direction of the voyage, must take care that the goods shall be *bona fide* exported and not landed again."

"By what I have said, I think it is plain that the offence is not within the words or the meaning of the 18 Geo. II. They are certainly not prohibited goods, for they were lawfully imported, and paid the customs. And, for the same reason, they are not goods liable to be seized for not paying customs, they having paid them already, and they cannot be liable to pay them again, because it was agreed that they should never again be brought into Great Britain."

"The only other words in the act, which can possibly relate to the offence in question, are, landing goods without the presence of an officer; and those plainly cannot be such, because the agreement is, that the same shall never be relanded; and if an officer was to be by when those were relanding, yet the offence would be just the same."

"And as this offence is not within the words, so it is as clearly not within the meaning of the act; for the meaning of the act was, to reclaim, if possible, some sturdy stout fellows, who might make useful seamen in his Majesty's navy; but those who are guilty of those sorts of frauds are seldom of this sort. Besides, it can never

be imagined that the legislature intended to pardon a notorious cheat, much less a cheat attended with perjury, which is a crime of so very heinous a nature, that it is expressly excepted out of all the Acts of Grace which can possibly extend to it."

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"I think, therefore, that it may as well be said, if an Act of Grace was to pass, pardoning robbery, burglary, and saying nothing of murder, that murder was within the meaning of such an act, as to say that this offence is within the meaning of the 18 Geo. II."

"What was said, that this act is to be construed most beneficially for the subject, can have no weight in the present case, because, considering the nature of those crimes which are pardoned by this act, it certainly ought to be construed strictly, and, besides, it is plain that it was the intent of the legislature that it should be so construed, because the words *most beneficially for the subject*, though (as the plaintiff's case rightly observes) they are in all the other Acts of Grace since the Restoration, are omitted in this."

"I shall now take notice of the act 9 Geo. II.; and, we think, upon considering it, that it affords no argument on the part of the defendant. After just the same words as there are in the present act, are those words, "or for making any false report or entry of the landing of any ship or vessel, inwards or outwards."

"Now, entering the goods of a ship for exportation, to parts beyond the sea, which are intended to be relanded in Great Britain, is certainly a false entry, and for that reason this exception is put in afterwards."

"Leaving to his Majesty, his heirs, &c., all debts, dues, and demands, due or owing to his Majesty, for, or in respect of any sum or sums of money, by him or any of his predecessors, at any time paid, on any debenture or debentures, certificate or certificates, where such debenture or certificate was wrongfully or fraudulently obtained, or where the same debenture afterwards became void, by the landing of the goods therein mentioned."

"Now, as the legislature plainly had this act in their view when the 18 Geo. II. was made, because it is copied almost *verbatim*, till it comes to those words, *or for making any false report, &c.*; these seem to be purposely omitted, lest there should be a pretence that this offence was pardoned by the Act 18 Geo. II."

"And, as a further proof that it was not intended to be included in that act, the saving clauses are likewise omitted."

"For these reasons, we are all of opinion, that the offence stated in the question proposed to us, is not released or discharged by the 18 Geo. II."

It was therefore ordered and adjudged, that the judgment below be reversed with costs.

For Plaintiff, *Sir D. Ryder, Wm. Murray.*

For Defendant, *A. Hume Campbell, K. Evans.*

*Note.—This case unreported in Court of Session.*

[M. 3281.]

**FORBES**  
v.  
**FORBES.**

Mrs. JEAN FORBES, wife of Captain Dundas,  
and ELIZABETH FORBES, wife of Dr. John  
Gregory, and both Daughters of the late  
Lord Forbes - - - - - } *Appellants;*

JAMES, LORD FORBES - - - - - *Respondent.*

House of Lords, 29th January 1756.

**DECATHBED.**—An antenuptial contract of marriage, in the shape of an entail, contained a reserved faculty and power to grant provisions to younger children on deathbed, and to affect the estate therewith. Held, reversing the judgment of the Court of Session, that bonds of provision granted on deathbed were not reducible on deathbed, they having been executed in exercise of the reserved faculty.

LORD WILLIAM FORBES, the appellants' father, in contemplation of his marriage with Dorothy Dale, entered into an antenuptial contract of marriage, by which, in consideration of £10,000 of tocher, the lady's father agreed to give with his daughter, he thereby bound and obliged himself to infest and seize him, the said Lord Forbes, and the said Dorothy Dale, and the longest liver of them, in liferent, for her liferent use allenarly, and the heirs male to be procreated betwixt them in fee, whom failing, to the said Lord Forbes his other heirs male whatsoever; whom failing, to the heirs female to be procreated betwixt them, with several remainders over in the whole lands and Lordship of Forbes.

There was this reservation or exception in favour of burdening; “in case there be an heir male of the marriage, and one or more younger children, it shall and may be lawful for the said Lord Forbes, at any time in his life-time, *et etiam in articulo mortis*, to make such provisions for his said younger child or children as he may think fit; and therewith to affect and burden the foresaid lands and estate, providing the same do not exceed in whole the sum of £3000 sterling, and to divide and proportion among the said younger children as the said Lord Forbes shall direct and appoint. And the heir male succeeding to the said estate shall be holden and obliged, and by acceptance hereof, they are held and obliged to pay the said sum of £3000, or such part thereof, in such way and manner, and to such persons as the said Lord Forbes shall direct

" and appoint, and, in case the said Lord Forbes shall die without making any provisions for such younger child or children, or shall not charge the estate with the whole sum of £3000 for that purpose, then, and in either of these cases, it shall and may be lawful for the said Dorothy Dale, if she survive the said Lord Forbes, to charge the said estate with the said sum of £3000, or any such part thereof as shall not be charged by the said Lord Forbes."

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Of this marriage there was issue, Francis a son, and three daughters, Mary, Jean, and Elizabeth.

Of this date, Lord Forbes executed, in terms of the above June 17, 1730. contract of marriage, bonds of provision to each of his daughters; to Jean, £666. 13s. 4d.; and to Elizabeth £500 sterling, to Mary £833. 6s. 8d. Any daughter deceasing before the term of payment, it was provided, that their provision was to return to Francis, whom failing, to accresce to his surviving daughters.

Lord Forbes died nine days after executing these bonds.

Lady Forbes being entirely unacquainted with her affairs, ignorant of the marriage contract rights, and while in affliction for loss of her husband, was induced by the relatives of the family, who represented that the estate was exhausted with debt, to execute a bond of restriction of her liferent July 2. 1730. provisions, restricting the same to the liferent of the free rents and profits of the heritable estate, after deducting the interest payable on the heritable debts. After the death of her son, she also entered into a similar deed with Oct. 27, 1735. his uncle, who succeeded. Both deeds were granted on condition of their not challenging the deeds of provision in favour of her daughters, on the head of deathbed.

On being advised, that the bonds were not reducible on the head of deathbed, the daughters brought action for payment, with interest since they became payable. The defence stated was, that these bonds of provision were granted on deathbed. It was answered, that being executed in implement of a power reserved in an antenuptial contract of marriage, the plea of deathbed could not strike against them.

The Lord Ordinary found "it proved that the deed was Dec. 10, 1754. granted on deathbed." On reclaiming petition, the Court pronounced this interlocutor: "The Lords having advised Feb. 12, 1755. the above debate, sustain the defence of deathbed, relevant to asoilzie the defender from the claims of annual rents made by the pursuers upon their bond of provision previous to their respective majorities, and remit to the

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"Lord Ordinary who pronounced the act to proceed accordingly."

Against this interlocutor, the present appeal was brought.

*Pleaded for the Appellants* :—*1st*, The law of deathbed was never held sufficient to reduce deeds which the granter was bound to execute by an antecedent obligation. To provide for children is both a natural and civil duty; and therefore deeds executed for that purpose ought to be supported against the objection of deathbed as far as possible. In the present case, the power reserved to William Lord Forbes of burdening the estate with £3000 to the younger children was an onerous stipulation, and an obligation undertaken on his part for a most valuable consideration—the marriage and the marriage portion advanced by Lady Forbes's father. And though William Lord Forbes reserved the power or faculty of burdening the successor in this estate with £3000, yet this faculty had only been exercised by him to the extent of £2000 sterling, which is within the power reserved. And it would be extremely rigorous and unjust to object the law of deathbed to such a case. *2d*, The principal sums provided by these bonds to the appellants not being liable to the objection of deathbed, the interest due thereon must be computed from the times at which the father directed these sums to be paid. And as the respondent has taken the estate of Forbes by service, as heir in special of William Lord Forbes, while the appellants had the natural right to succeed, as heirs of line, to the estate, the presumption of law is, that he takes, by virtue of the limitation in the marriage contract, in which the power of charging the lands for provisions to the appellants to the extent of £3000 is specially reserved; the respondent, therefore, cannot take the estate under that settlement without being burdened with all its conditions and provisions. *3d*, Their mother might by any agreement do as she pleased with her own, but she could not by any agreement, and from a mistaken apprehension that their bonds were reducible on the head of deathbed, agree to restrict the annual-rents on her daughters' provisions, so as to deprive them of the right to interest payable from the terms from which it is made payable.

*Pleaded by the Respondent* :—*1st*, The law of deathbed has always been extended, by the law of Scotland, to bonds of provision, and for this very just reason, that bonds affect the heir, and the estate to which he is called to succeed.

And it makes no difference in this rule, that the granter had reserved power, in a previous deed executed in good health, to dispose of or charge the estate on deathbed; because, if this were allowed, every man might have it in his power, by so doing, to annul the law of deathbed altogether. The bonds of provision, therefore, executed in virtue of the power reserved, were null and void, on the ground of deathbed, and good neither for principal nor for interest. 2d and 3d, But even assuming them good as to principal, it did not follow that interest was chargeable from Lord Forbes' death; because Lady Forbes had disposed of that question by the agreement, and she was bound, as liferenter, in any event, to keep the heir free of such charge.

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After hearing counsel, it was

Ordered and adjudged, that the bond of provision in question having been granted in execution of a faculty reserved in the contract of marriage, the exception of deathbed did not lie either against the principal sum of £2000, or the annualrents or interests thereof: and it is therefore ordered, that so much of the said interlocutors as are complained of (sustaining the defence of deathbed to the extent of the annualrents) be reversed, and that the defence of deathbed be repelled; and it is further ordered, that the cause be remitted to the Court of Session in Scotland, to proceed therein accordingly.

For Appellants, *Ro. Dundas, C. Yorke.*

For Respondent, *W. Murray, Al. Forrester.*

NOTE.—*Vide* Kames, p. 109; also Kilkerran. The Lord Chancellor, Hardwicke, according to the note on his papers, written by himself, sustained the deathbed deed, because it was executed in virtue of a reserved faculty.

[Mor. 4549.]

JOHN WILSON, Collector of His Majesty's Customs at Stockton, in the County of Durham; and RICHARD SWANSTON, Solici- tor of Customs, His Attorney. -	}	<i>Appellants;</i>
ROBERT BURNTON, and JAMES CHALMERS, both Merchants in Edinburgh, -		

*Respondents.*

House of Lords, 20th Feb. 1758.

FOREIGN DECREE.—Effect of foreign decree in seeking its execution in the Courts of this country.

The Court of King's Bench in England, in a suit brought

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there by Scotch merchants, against his Majesty's collector of customs at Stockton in Durham, for delivery of wheat, which belonged to them, and which was shipped from Leith to New Zealand in their ship, but which had stranded in the course of its voyage near that port, and the wheat saved by the collector and others, and taken possession of, subject to a claim of salvage, had pronounced judgment in favour of Wilson with £60 costs. Wilson then raised action against the respondents for the £60 costs, in the Court of Session, within whose jurisdiction the respondents resided; and founded on his decree in England, with the view of obtaining decree conform to the decree given in the Court of King's Bench. In defence, it was stated that the decree was iniquitous. In reply, it was answered, that it was not competent to enquire into the merits of that decree; and that it must be deemed *quoad res judicata pro veritate habitur*. On report to the whole Lords, the Court refused to give execution for the £60 sterling of costs, awarded by the Court

Jan. 7, 1756. of King's Bench, and sustained the defence founded on the iniquity of the decree.

Against this interlocutor the present appeal was brought.

This day being appointed for the hearing counsel, upon the petition and appeal of John Wilson, complaining of an interlocutor, 7th Jan. 1756, made on behalf of Robert Burnton and James Chalmers, and praying reversal of same; to which appeal the said Robert Burnton and James Chalmers have not put in their answer, though peremptorily ordered so to do. Counsel were accordingly called in to be heard; and one counsel only appearing for the appellants, (none appearing for the respondents); he was heard to state and argue the case on behalf of the appellants. And having prayed a reversal of the interlocutor complained of, the said interlocutor was read; and then the counsel was directed to withdraw, and due consideration had of what was offered.

It is ordered and adjudged, that the said interlocutor complained of be reversed; and it is hereby declared, that the respondents are liable to answer and pay the sum of sixty pounds sterling costs, awarded by the Court of King's Bench: And it is further ordained, that the defence of the said respondents be repelled; and that the said respondents do accordingly pay the said sum of sixty pounds to the appellants, together with their expenses of the suit in the Court of Session; and that an account thereof be given in. And it is further ordered,

that the said Court of Session do give proper directions  
for carrying this order and judgment into execution.

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For Appellants, C. Yorke.

*Note.*—“The judgment was reversed, singly upon this footing, as I am informed, that in England the decrees of sovereign courts abroad are put in execution by the Courts of Westminster-Hall, without admitting any objection against them.”—Kames’ Decisions, p. 131.

The Act 12 Queen Anne, c. 18, made perpetual by 4 Geo. I. c. 12. entitles the party who has a claim for salvage to payment within 30 days after the service performed, “and in default thereof, that the ship or goods shall remain in the custody of the collector until paid, or good security given.”

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[M. 3529.]

JAMES GRAHAM, - - - - - *Appellant;*  
ELIZABETH KER, - - - - - *Respondent.*

House of Lords, 9th March 1758.

NEGOTIORUM GESTOR—INTERDICTION.—Held a party who acted voluntarily, and without any legal authority, for another, in changing the security of money lent, was liable, on failure of the new borrower, notwithstanding the person for whom he acted was of age —was present on the occasion, and consenting to the whole transaction, but was unable to manage his own affairs, from weakness of mind, and was soon thereafter interdicted.

FROM his living near the farm, Graham, the appellant, was induced to take an active part in the management of Thomas Ker’s affairs. While in minority he had acted as his curator. This curatory was discharged on his coming of age. Yet Ker being weak in intellect, his mother continued to manage his farm after his attaining majority, and was in the practice of receiving aid in so doing from the appellant. This assistance was rendered after the appellant was discharged from the office of curatory, and before he was appointed one of Ker’s interdictors, which took place sometime afterwards.

1758.

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At this particular intervening juncture notice was given that a bond for £472, due by Mr. Fotheringham to Ker was to be paid up, unless the sum was allowed to lie at  $4\frac{1}{2}$  per cent. interest. Whereupon the appellant ordered the money to be received, and lent out to one Kinnear, a merchant, at 5 per cent. Kinnear failed, and the question was, Whether the appellant Graham was liable for the money so lost as *negotiorum gestor*?

Nov. 1756. The Court of Session held he was liable; and against this judgment the present appeal was taken.

*Pleaded by the Appellant:*—Thomas Ker being of age at the date of Kinnear's bond, and being present and concurring in the whole transaction, the same in law must be received as his own act. At that time he was not under any legal incapacity from acting in his own affairs, and under no constraint against lending his money; and the part the appellant took was merely that of a friend, lending his assistance to, instead of acting for another, in procuring an additional per centage for his money. This being the nature of the appellant's interference, none of the characters of *negotiorum gestor*, or of *mandatory*, apply to the case, and consequently no obligation arises which can make him responsible for the debt so lost; but, separately, John Ker, Thomas Ker's uncle, who acted as guardian to Thomas Ker's children after his decease, during which time Kinnear was solvent, ought to have called up the money from Kinnear, if he thought the security insufficient. Instead of this, the respondent, and John Ker, who acted for her children, remained satisfied with that security for two years.

*Pleaded for the Respondent.*—A person who voluntarily, and without any authority, takes the management of another's affairs, makes himself responsible for all the consequences. He excludes all others from acting, and therefore is bound to bestow great care, so much so, that mere negligence, without any ill design, will subject him in liability. The appellant, therefore, having managed Thomas Ker's affairs in the loan in question, without any authority, is liable for the loss of the money lent to Kinnear by the latter's failure. And it is no answer to this to say, that Thomas Ker was himself present, and acting in the affair, because Thomas Ker was notoriously at the time of weak and facile mind, and unable to comprehend, far less to give his sanction to any such transaction.

After hearing counsel, it was  
Ordered and adjudged that the said interlocutors be, and  
the same are hereby affirmed.

1758.

HIS MAJESTY'S  
ADVOCATE, &c.

v.

DUKE OF  
MONTROSE,  
&c.

For Appellant, *R. Dundas, Al. Forrester.*  
For Respondent, *C. Yorke, Al. Wedderburn.*

His MAJESTY'S ADVOCATE, in behalf of the }  
PRINCIPAL and PROFESSOR of the COLLEGE } Appellant;  
of GLASGOW - - - - - }

His Grace the DUKE of MONTROSE, and Others, Respondents.

House of Lords, 15th March 1758.

TEINDS—OLD VALUATIONS UNRATIFIED.—The Tithes of a parish were valued, but the decret of valuation was lost, and the only evidence was an old book, containing the valuation of the Subcommissioner of Teinds not ratified by the Chief Commissioners. Held it competent for the Teind Court, at the distance of 100 years, to ratify the report of the old valuation of the Subcommissioners.

THE respondents, the Duke of Montrose and Others, were heritors and landowners in the parish of Drymen, in the county of Dumbarton, and brought an action before the Court of Session, as Commissioners for the Valuation of Teinds, to have it declared that their teinds were valued, and to interpose their authority, and to certify and approve of the old valuation of the subcommissioners in the following circumstances.

It was stated, that their tithes were all valued, but, in consequence of the wreck of the vessel which brought back the records of Scotland from England after the Restoration, and also the great fire that destroyed the records of the Teind Court, where most of the decrees of valuation made by the commissioners and subcommissioners were deposited, the valuations could not be proved, yet a book had been discovered in the Lower House of Parliament some years ago, containing valuations of the subcommissioners in seventeen presbyteries in Scotland; and this book contained the report of those subcommissioners of the tithes for the presbytery of Dum-

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HIS MAJESTY'S  
ADVOCATE, &c.v.  
DUKE OF  
MONTROSE,  
&c.

barton, from which it appeared, that those commissioners appointed by King Charles I. did, in the year 1627, authorize certain subcommissioners to settle and adjust the tithes of the whole lands within the presbytery of Dumbarton. These subcommissioners accordingly met at Dumbarton, on 22d April 1629, and after proof taken, concluded their valuation on 31st March 1630, and their report was drawn out and duly lodged in Holyrood House, on 16th June thereafter. This report contained the valuation of the respondents' lands of Drymen; and although the ratification by the general commission could not be found, owing likely to the above destruction of the records, yet the respondents (pursuers) submitted there was evidence sufficient to sustain the valuation of the subcommissioners, and to entitle them to insist for a ratification of the same.

Feb. 22, 1757. The Lords, of this date, pronounced this interlocutor :

" Ratify, allow, and approve the valuation of the subcommissioners of the presbytery of Dumbarton, in so far as concerns the pursuers, their lands libelled, and interpone their decree and authority thereto, and decern and declare accordingly."

Against this interlocutor the present appeal was brought.

*Pleaded by the Appellant.*—1<sup>st</sup>, The Court of Session has no power to ratify or approve the subcommissioners' report for valuation of tithes: for though the acts 1633 and 1661 empowered the commissioners therein named to receive reports from the subcommissioners; yet that power not being repeated in the act 1663, or subsequent commissions, it may be presumed that no further authority was given to the Court of Session by the act 1707 than was contained in the commission of 1663. 2<sup>d</sup>, The subcommissioners' report being therefore of no effect, until confirmed by the high commission, is to be viewed as no better than a begun process, and a step in the proceeding, which has become of no effect from not being completed, and at this distance of 100 years cannot now be ratified; it being deserted for more than 40 years, has become void by the negative prescription. 3<sup>d</sup>, The heritors in the parish of Drymen had, moreover, departed from this valuation of the subcommission, having possessed their tithes on a different title, by accepting leases from the crown, and by paying tithes according to the stipulation in those leases. 4<sup>th</sup>, That the report produced was also defective, without the consent of the Archbishop of Glasgow, who was then titular of the tithes.

*Pledged for the Respondents.*—1*st*, That the powers of the Court of Teinds, in this matter, cannot admit of doubt, which were, “to determine in all valuations and sales of teinds conform to the rules laid down, and powers granted by the 19th act of Parliament 1633,” &c. And by the Act 1633 they had powers “to receive the reports from the subcommissioners within each presbytery, of the valuation of whatsoever teinds led and deduced before them, and to allow or disallow the same.” 2*d*, That prescription, positive or negative, does not apply to this case, as the subcommission sufficiently barred any such. 3*d*, Undoubtedly leases had been from time to time granted of the tithes, but at a lower rate of valuation, than that in the decree of valuation, so that it was impossible to infer from these leases, a desertion of the real valuation, or that the decree of valuation was awarded. Even if a different valuation had been afterwards adopted, it could not possibly affect the interests of the whole landholders of the parish, who are not to be presumed to have surrendered so valuable a benefit; and all the objections urged by the appellant have been, by various decisions of the Court, overruled, and this upon an equitable construction of the acts of Parliament.

1758.

Act 1707.  
HEPBURN, &c.  
v.  
CONGALTON.

After hearing counsel, it was,  
Ordered and adjudged that the interlocutor complained of be affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*  
For Respondents, *Al. Forrester, Al. Wedderburn.*

Not reported in Court of Session.

[M. 15507.]

JOHN, JAMES, GEORGE, and ANNE HEPBURN, and their TUTOR <i>ad litem</i> ,	-	{ <i>Appellants;</i>
CHARLES CONGALTON, and Others,	-	

House of Lords, 6th Dec. 1758.

**ENTAIL.—RESOLUTIVE CLAUSE.**—Imperfect resolutive clause appearing in an entail: Held, the entail not good against debts contracted in contravention of the prohibitions. But that the next heir-substitute succeeding to the contravener had good action against him and his representatives to purge the estate of such debts.

The entail of the estate of Humbie, executed before the act 1685, with prohibitions against selling, disponing, wad-

1758.

~~HEPBURN, &c.  
v.~~

setting, or burdening the estate, was objected to by the creditors of an heir of entail in possession, who contracted debt against the prohibitions.

CONGALTON.

*1st*, That the entail was not recorded in terms of the statute 1685 ; *2d*, That it had not a sufficient irritant clause, and, in particular, *3d*, That it had no resolutive clause, annulling and determining the right of the person contravening ; and that the clause, which declared “ it lawful for the next heir “ of tailzie, to enter and infect themselves as heirs of tailzie “ in the estate ; and to enjoy and possess the same, without “ being liable for, or acknowledging the bonds, dispositions, “ deeds, or other facts or rights, as shall happen to be done, “ contrary or derogatory to the provisions or restrictions “ above mentioned,”—was not a sufficient resolutive clause.

Feb. 8, 1758. The Court repelled the objections as to the recording, and also as to the irritant clause, holding, that it was properly inserted in the entail, but sustained the objection to the resolutive clause, in respect that the entail contained no sufficient “ resolutive clause, forfeiting the right of the heirs of “ tailzie, who should contravene the conditions and provisions “ thereof.”

Both parties appealed to the House of Lords, the respondent, on the point as to the non-recording of the entail, in terms of the Act 1685.

After hearing counsel, it was

Ordered and adjudged, that it appears to this House not to be necessary, in the present cause, to determine the question arising from so much of the said interlocutor as is complained of, by the cross appeal ; and it is therefore ordered that the said cross appeal be dismissed ; and it is further ordered and adjudged, that the said original appeal be, and is hereby dismissed, and the interlocutor complained of, affirmed.

For Appellants, *Al. Forrester, Fred. Campbell.*

For Respondents, *C. Yorke, Al. Wedderburn.*

*Note.—Lord (Chancellor)\* Hardwicke, has this note on his appeal case. “ Macdowal, B. 2. Tit. 3, p. 370, material. “ When the tailzie contains prohibitive clauses to contract debts, but does not bear any irritancy of the contravener’s right, the debts are effectual ; it being against common justice that the debtor should retain his full right, and his creditors lose their payment ; but in that case the next, or any other substitute, who may succeed as heir of entail to him who contravenes, has good action against him and his represen-*

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\* *Vide Preface.*

tatives, whereby to oblige him to purge the tailzied estate of debts, as was just said of a tailzie, with irritant clauses not duly recorded.— On the original appeal affirmed, on the point, of the want of a sufficient resolutive clause to irritate the right of Mr. Hepburn's debtor; and dismiss the cross appeal, with a declaration, that it was unnecessary to determine, in the present cause, the points thereby brought in question."

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LITTLEJOHN  
v.  
STRATON.

ALEXANDER LITTLEJOHN of Woodstone,      *Appellant;*  
ARTHUR STRATON      - - - -      *Respondent.*

House of Lords, 1st February 1759.

SALMON FISHING—RIGHT.—A party's grant of fishing was described as bounded along the shore between certain points therein described; held that this does not exclude another, whose right is prior, though general in its terms, from acquiring possession of part of the fishings within the points so marked out and described.

By Crown charter granted in 1588 to James Keith, the appellant's predecessor, the lands of Halwoodstone, Hillend, and Fisherhill, part of the barony of Woodstone, situated in the county of Kincardine, was conveyed with a salmon fishery in these terms; “cum piscationibus tam piscium alborum quam rubrorum super arenas vulgo vocat St. Cyrus sands enter semitem vulgo vocat priestis-rodfrute ab oriente, et torrentem vulgo vocat the burn (rivulet) of Mauchrie, ab occidenti, aut eo circa jacen in Baronia de Woodstone.”\*

By regular progress of titles these lands, with the fishings as above described, came, through successive owners after Keith, to be acquired by the appellant; and, in virtue of these titles, and the above charter, he had possessed a fishing on the sands of St. Syrus, within the points above expressed, as contained in the said crown charter, as well as subsequent, charters of the same.

The respondent held his lands, which extended along the sea shore, under charter “cum piscationibus et piscariis tam alborum quam rubrorum piscium cum singulis suis pertinentes, jacens infra regalitatem de Lindores et Vicecomitatem de Kincardine.” Under this charter of alienation from a subject; and also, charter of alienation from Alardice to the Earl of Montrose in 1588; and charter of alienation from the Earl to the respondent in May 1630; and charter from the crown in 1631, the respondent claimed the fishings opposite

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\* So written in the charter.

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to these lands of Scotstoun and Mauchrie; and also possession of fishings further east than the Burn of Mauchrie, to a green baulk or bank, which divides the lands of Mauchrie from the minister's glebe at that point,—he having, in virtue of this title, been in immemorial possession of such fishings.

The appellant, conceiving that the respondent was encroaching on his right of fishing, by extending the same farther east of the burn of Mauchrie than he had right to, raised an action of declarator to have his right of fishing declared.

**Dec. 18, 1755.** The Justice Clerk, Ordinary, “ Found the writs and con-  
 “ descendance given in for the defender, do not exclude the  
 “ pursuer's titles; and, in regard the pursuer's rights are  
 “ long prior to those produced for the defender, and that the  
 “ defender does not allege possession upon the titles of  
 “ any part of the fishing libelled, or within the boundaries  
 “ thereof, as described by the pursuer's indentment, and in  
 “ the libel, so as to have acquired right thereto by prescrip-  
 “ tion, find the pursuer has the sole right to the fishing li-  
 “ belled, exclusive of the defender, and decreed and de-  
 “ clared in terms of the libel.”

In a representation against this interlocutor, the respondent offered to prove:—That in virtue of his titles, he and his predecessors had possessed a salmon fishery beyond Mauchrie burn, as far as the minister's glebe, which is divided by the lands of Mauchrie by a green baulk, so that his fishing came within the limits of the appellant's grant.—That in the appellant's original grant, there were added the words, “ *aut eo circa*,” which plainly shewed that this boundary was a little vague and uncertain, at the time the fishery was granted to the appellant's ancestor, though these words are omitted in the subsequent charters: The respondent's titles were more ancient than the appellant's, for he had charter of date 12th March 1543, of the lands of Scotstoun and Mauchrie, “ *cum piscationibus et piscariis*;” another charter in 1588; and another in 1630. That these grants showed, that the Abbots of Lindores, to whom the whole lands and fishings belonged, were divested of the fishings in 1543, prior to the appellant's grant in 1588.

**Dec. 23, 1757.** After proof being led, the Lords, of this date, found, “ That  
 “ the pursuer has right to the fishing from Priestroodfoot, as  
 “ far west as the green baulk at the west side of the minis-  
 “ ter's glebe; and found that the defender has right to the

"fishing, as far east as the green baulk, and decerned and declared accordingly."

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Against this interlocutor the present appeal was brought by the pursuer :—

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LITTLEJOHN  
v.  
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*Pleaded for the Appellant.*—The lands of the appellant lie at a distance from the sea coast, and his fishings were granted as a separate and distinct estate, unconnected with the lands, and on condition of paying a separate reddendum or feu-duty to the superior. This grant proceeds from the crown, is prior in date to that of the respondent's.—The respondent's earliest grant from the crown being dated 1631, and conceived in general terms, without any particular description of its extent, and given merely as a pertinent of the lands. No such grant, merely general in its terms, and subsequent in date, could infringe the limits, or prejudice the right of the appellant, after the crown had already divested itself to that extent. The limit and boundary of the appellant's fishings are described in the most exact manner, both in the titles and by permanent land marks on the shore.—The right of fishing given,—extending from Priestrodfoot on the east, to Mauchrie burn, gives him an exclusive right of fishing along the sands of St. Cyrus, or whole coast within those two points, or as it is described in the title :—"Super arenas vulgo vocat St. Syrus sands inter semitem vulgo vocat Priestroadfute ab oriente et torrentem vulgo vocat, the burn of Mauchrie. ab occidente."—These limits being so expressly ascertained, no usage or possession of a third party can alter the limits so expressly fixed ; and no mere refraining on his part from fishing on a certain part within those boundaries, will be effectual to constitute a right of fishing in another, or make him lose his right from non-use. Possession of one part of his fishing is good for the whole ; and perfectly legitimate to stop the currency of prescriptive possession, on the part of the respondent. By the interlocutor complained of, new limits are fixed to the fisheries, entirely different from those specially described in the grants; and to that extent the appellant's grant is so far annulled.

1588.

*Pleaded for the Respondent.*—The conveyance of the lands of Scotstoun and Mauchrie, una cum pescationibus et piscariis tam alborum quam rubrorum piscium, is a proper conveyance of a salmon fishing within the bounds of those lands, and being prior in date to the appellant's grant, and followed by possession for 40 years, gives a preferable title to the fishings.

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**ANDERSON**  
v.  
**ANDERSON.**

The appellant's right of fishing, as bounded and described in Archibald Wood's charter of 1588, conveys only such a right of fishing upon these sands, as belonged to the lands granted by that charter, and therefore is not exclusive of the respondent's right to a salmon fishing, upon a very small part of these sands, opposite to the estate of Scotstoun and Mauchrie. If the charter of Archibald Wood imply a conveyance of salmon fishing over the whole sands of St. Cyrus, from Priest-rodfoot to Mauchrie burn, then it was a grant which was beyond the power of Archibald Wood to make, because the fishings opposite to Scotstoun and Mauchrie, which actually form a part of the sands of St. Cyrus, within the limits specified, were already in possession of Sir Thomas Erskine. The respondent's title, therefore, as derived from Sir Thomas Erskine, who held the lands of Mauchrie and Scotstoun from the Abbacy of Lindores, prior to 1543, is a proper title to the salmon fishing, within the bounds of the lands thereby conveyed ; and the Abbacy then being superior of the lands, just as the king is now superior, the respondent's derivative right is as good as the appellant's—is clearly prior to his, and is besides fortified by prescriptive possession, and ought therefore to be preferred.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be affirmed, with £100 of costs.

For Appellant, *Al. Forrester, Al. Wedderburn.*

For Respondent, *C. Yorke, Fred. Campbell.*

Not reported in Court of Session.

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ROBERT ANDERSON, Mason,  
JAMES ANDERSON, late of Crookhill,

*Appellant ;*  
*Respondent.*

House of Lords, 26th Feb. 1759.

**SALE—SECURITY FOR PRICE.**—Circumstances in which held, where a purchaser did not find satisfactory security for payment of the price within the time specified in the minute of sale, though cautioners were offered, but rejected as insufficient, the seller was entitled to sell the property to another.

THE lands of Crookhill, belonging to the respondent, were burdened with debt to such an extent as to compel a sale

on the part of the creditors. The respondent proposed to the creditors to sell the estate, and pay them the amount of their debts, on condition of their compounding part of their claims. This proposal being acceded to by them, he entered into a minute of sale and agreement with the appellant, whereby the latter was to purchase the lands, to pay a certain price therefor, at specified periods, and to grant two sufficient securities for the payment of the price, "within ten days after the sale."

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ANDERSON  
v.  
ANDERSON.

The appellant failed to produce cautioners satisfactory to the seller and his creditors; the consequence was, that letters of horning on the minute of sale and agreement were taken out, and he was charged to implement his agreement. This produced no result, and the respondent being pressed by his creditors, the estate was again exposed, and sold off new to Robert Pollock, who became bound to pay all the debts of the creditors. Pollock was infest, entered into possession, and paid all the debts and encumbrances. Whereupon the appellant raised letters of horning on the first sale, to charge the respondent to perform his part of the agreement of the sale of the estate to him. The present suspension was then brought before the Court of Session.

After various procedure, and proof led as to the circumstances of the appellant, and the cautioners offered by him, the Court ultimately pronounced this interlocutor:—" Hav- June 29, 1757.  
" ing again advised this petition, with the answers and proofs  
" adduced in consequence of their interlocutor of the 4th  
" December 1755, they find that the charger (appellant) not  
" having implemented his part of the minute of sale, by pay-  
" ment of the sums thereby stipulated, or finding caution in  
" terms thereof, the suspender was at liberty to enter into  
" the second bargain with Bailie Robert Pollock, and there-  
" fore suspends the letters *simpliciter*, and decern with ex-  
" penses."

On reclaiming petition the Lords unanimously adhered. July 12, 1757.  
Against these interlocutors the present appeal was brought. Aug. 10, —

*Pleaded for the Appellant*:—Having obtained a decree reducing and setting aside the second purchase, he was *in titulo* to insist for performance of the first agreement with his brother, James Anderson; and this decree, though one by default, and obtained in absence of the defender's counsel, was good to sustain the title. The cautioners offered by him ought not to have been rejected, as they were of good and unexceptionable credit for the sums referred to, which

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ANDERSON.

was proved by some of the witnesses adduced, who deponed that they were good to the extent of £100 sterling. He was not bound to find caution to the satisfaction of Bogstoun and Mr. Wotherspoon the creditors, but to his brother alone, who was the seller. But even in regard to the creditors, they had agreed, by minute of agreement immediately after the sale, upon his paying the price, to deliver him a full discharge of all debts due by him to them absolutely and unconditionally. And there is little doubt, had it not been for the interference of these parties, the whole matter would have been arranged, as agreed in the minute of sale.

*Pleaded for the Respondent* :—In judicial sales, and in all private voluntary sales of lands, the constant practice is to hold the purchaser bound to find security for payment of the price within a short limited time after the sale, in order to secure the seller and his creditors from any disappointment. And in all such cases, it has never been doubted that the purchaser forfeits his purchase, and the seller is again at liberty to sell the estate, unless satisfactory sureties are offered, within the time expressly prescribed. This is the more necessary and imperative where, as in this case, the avowed purpose of the sale was, to discharge encumbrances, and to relieve the respondent from the pressure of debts. And it was a fact, beyond all dispute, that both the cautioners offered by Robert Anderson were at the time utterly insufficient, one of them having soon thereafter fled the country for debt, and the other in bad circumstances.

The appellant applied to the House of Lords, by petition, for further time to prepare his cause, but it was rejected.

Thereafter counsel appearing for the said respondent ; but none appearing for the appellant : and the respondent's counsel having prayed an affirmance of the several interlocutors complained of with costs: it was ordered and adjudged that the interlocutors therein complained of be affirmed, with £20 costs.

For the Respondent, *Rob. Dundas, C. Yorke.*

Unreported in Court of Session.

[M. 10,777.]

HIS MAJESTY'S ADVOCATE,	- - -	<i>Appellant;</i>	1759.
EARL OF HOME,	- - -	<i>Respondent.</i>	

HIS MAJESTY'S  
ADVOCATE  
v.  
EARL OF HOME.

House of Lords, 7th March 1759.

**PATRONAGE—PRESCRIPTION—POSSESSION—COMPETITION OF RIGHT TO PRESENT.**—Held the right of patronage reverted back to the Crown by 40 years' possession of the right of presenting, although an ancient right existed in a subject on which no possession had followed.

ON the church of the united parishes of Hutton and Fishwick becoming vacant, by the death of the incumbent, his Majesty was pleased to present the Rev. Mr. Philip Redpath to the vacant benefice. The Earl of Home, also claiming the patronage of the parishes, presented Mr. George Bell, and brought an action of declarator to have it found that he had best right to present to the vacant benefice, on the ground, although he had no right to the patronage of Fishwick, and admitted his Majesty's right to present *per vices* to the united parish, yet with respect to Hutton, he had right to the patronage of the same, by charter from William Earl of Douglas, dated 26th April 1451, granting the parish kirk of Hutton to the collegiate kirk of Douglas, and the patronage thereof, to Sir Alexander Home of that ilk, which grant was confirmed by a charter under the great seal, of 8th May 1458, and that the patronage had continued in all the subsequent investitures of the estate of Home. The respondent pleaded that possession had followed in 1728, when his guardians presented to the living. Defence. The king is by law patron of all benefices in Scotland, and rights of subjects to patronages have all originally flowed from grants of the crown; and that the antiquity of the Earl's charter, obtained from the Earl of Douglas, was not good without possession, which had not followed upon it. On the contrary, the crown had been in possession, and had presented for more than forty years. Answer. That prescription did not take place in the case of patronages. Reply. Both by the law and practice, prescription did run in the case of patronages. The Lords of Session at first preferred the crown to the patronage; but, on reclaiming petition, the Court altered and preferred the Earl of Home. The crown appealed.

June 27, 1758.

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GORDON  
v.  
GORDON.

For the appellant it was pleaded, That his Majesty, *jure coronæ*, is by law the original patron of all the benefices in Scotland. The crown can only be divested of this right by one of two ways; either by special grant from the king, or by forty years' uninterrupted possession following on a charter and sasine in favour of a subject. In the present case, no possession is alleged, and of consequence, the charter from Earl Douglas, on which the respondent's right is solely founded, can be no title, in competition with the crown. The right is returned to the crown by non-use, under the old charter, whereby the appellant has separately acquired a title by positive prescription, and uninterrupted possession.

Counsel were called in, and counsel appearing for the appellant (but none for the respondent), they were heard to state and argue the case on behalf of the appellant: and having prayed a reversal of the interlocutor complained of, they were directed to withdraw; and due consideration being had of what was offered, it was

Ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is, hereby reversed; and the interlocutor of the Lords of Session of the 27th June 1758, preferring the crown to the patronage be, and the same is hereby affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*

Note.—Lord (Chancellor) Hardwicke has this note on his appeal papers, "Reversed, the respondent making default. The Crown is great patron of all livings in Scotland, unless a title be shewn against the king."

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[Mor. 6678.]

DUKE OF GORDON,	-	-	-	<i>Appellant;</i>
JOHN GORDON,	-	-	-	<i>Respondent.</i>

House of Lords, 21st March 1759.

PROOF—FRAUD—RELEVANCY.—General allegations of fraud are not relevant to go to proof.

In this case (which see reported in Morison, p. 6678), it was held, in a reduction of a lease, that general allegations

of fraud in entering into the lease were not relevant to go to proof. The case was appealed.

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After hearing counsel, it was

GOVAN  
v.  
SIMPSON.

Ordered and adjudged that the interlocutor of the Court of Session be affirmed.

For Appellant, *R. Dundas, C. Yorke.*

For Respondent, *Alex. Forrester, Al. Wedderburn.*

ALEXANDER GOVAN or GIVAN, - - - Appellant;

AGNES SIMPSON or Govan - - - Respondent.

House of Lords, 26th March 1759.

#### Possession on Adjudication—Redemption—Heritable Creditor

—ASSIGNATION.—Held that though possession had followed on an adjudication, the legal of which was expired, but no infestment had followed, that the right was still redeemable, and that when such preferable heritable creditor gets possession of the estate, over which his own and other securities extend, a second creditor, who offers payment of the preferable debt so secured, is entitled to come in his place, and demand an assignation to his debt: also held, that this doctrine applied to a widow who had her liferent jointure secured over the estate, and that she was in the eye of law a creditor, entitled to such an assignation on offering payment.

By marriage articles between the respondent and her deceased husband John Govan, she was secured, in consideration of the portion she then brought her husband, in a liferent of one half the lands of Mains belonging to him. Subsequent thereto he engaged in trade, and contracted debt, among others to his brother Robert, to the amount of £388. 10s. 7d. chiefly secured by adjudication, but partly also by heritable bonds.

After John Govan's death in 1732, his brother, under his adjudications, entered into possession of the estate of Mains, and continued the same for 25 years, without the respondent, the deceased's widow, obtaining one fraction of her liferent jointure. In these circumstances, after the legal of the adjudication was expired, and after this possession had followed, she raised an action of mails and duties in 1751, founded on her liferent infestment, against the appellant. In defence, it was stated in bar of the action, that he possessed the lands by virtue of an heritable bond and infestment, granted by the respondent's husband, to which she consented, for 3000 merks, and also for another bond for 1400 merks, for which

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 GOVAN  
 v.  
 SIMPSON.

the security of the heritable bond was enlarged. And, 2d, That his adjudication taken for that and the other debts was a good title of possession, and gave a preferable right.

The defender was ordered to produce his adjudication and grounds of debt, and also an account of his intromissions with the rents. After various procedure and questions of accounting had, the case came ultimately to this point: Whether, on Agnes Simpson or Gordon paying the whole sums due to the adjudger, she was entitled to assignation of these heritable debts; in other words, to a conveyance of the adjudication, to the effect of keeping them up against the heir entitled to the estate?

Jan. 17, 1758. The Lords of Session " found that Alexander Govan " ought to assign to Agnes Simpson the adjudication at his " instance, upon her making payment to him of the sums " which shall be found remaining due to him, and that with " this quality, that the adjudication shall be redeemable at " any time by the heirs of the deceased John Govan, upon " payment to her of the sums which she shall pay to Alex- " ander Govan, and annual rents thereof; and remit to the " Lord Ordinary to settle the accounts between the parties."

March 2, 1758. On reclaiming petition, the Court adhered, allowing the appellant possession of the lands till Martinmass next, and grass to Whitsunday.

Against these interlocutors the present appeal was brought.

*Pleaded by the Appellant:*—The respondent's action was for payment of the arrears arising upon the liferent jointure of a half of the lands, and her title and the scope of her action go no further. The adjudication under which the appellant holds the lands being expired, the appellant is now absolute proprietor of the lands in question, and is entitled to hold the same, subject to the respondent's liferent over one half of them, against all and sundry except the heir, to whom he is willing to concede the power to redeem. The widow may have the liferent of the one half, and to this she is now welcome; but beyond this she has no right to insist as a mere liferenter in the assignation she demands. The respondent's right is not that of a creditor, and consequently she is not entitled to plead the equities of one. But even were she to be viewed as such, and had she an adjudication of the lands as a creditor, she could only have redeemed the appellant's prior adjudication during the currency of the legal, during which time only it was subject to redemption, but after the legal is expired, she was foreclosed. She is there-

fore not now entitled, on paying the appellant the debt due, to a conveyance of these heritable debts, or to the possession.

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*Pleaded by the Respondent.*—By the law of Scotland, where a preferable creditor gets possession of the estate of a common debtor the next creditor, on payment of principal, interest, and costs, has a right to come into the place of the preferable creditor, who, on receiving payment of his debt, is bound to grant an assignation thereof to such second creditor so paying to him. The Court below has proceeded on this principle. The preferable creditor has got possession here, which he has retained for 25 years, to the exclusion of the respondents, who having got the amount of his debt ascertained, and being willing to pay the same on such assignation, is entitled to have such a recourse and security granted her. And it is no answer to this to say, that she is not a creditor, because she is in every sense and view of law, a creditor, and the expiry of the legal is completely set at rest by the admission that the heir is entitled to redeem.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed, with £100 costs.

For Appellant, C. Yorke, A. Wedderburn.

For Respondent, Al. Forrester.

Not reported.

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ANGUS MACALISTER - - - Appellant;

JANE DUN - - - Respondent.

House of Lords, 2d May 1759.

MARRIAGE—CONSTITUTION OF MARRIAGE.—Circumstances in which marriage held to be constituted by cohabitation and acknowledgment.

The respondent was the daughter of John Macdonald of Ardnacross, a gentleman of good family. She afterwards married John Dun, a writer in Edinburgh, who died about a year thereafter, leaving her a widow. Soon thereafter a connection was formed with the appellant, and declarator of marriage was raised by her in the following circumstances. The summons set forth, that after her husband's death, being invited into Argyleshire, to visit her relations the Mac-

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alisters, she went there in the summer of 1755, and was received by her cousin, the appellant, and his sisters, with marked regard and attention.

Towards the end of the summer, the appellant proposed to visit Edinburgh in the ensuing winter, and employed the respondent to look out for lodgings for them. She offered them lodgings in her own house, to which, accordingly, they came, but after being there a fortnight, the appellant, thinking himself confined for want of room, removed to a different lodging, while his sister remained with the respondent. His sister remained with her until the end of December, when, having to return to Argyleshire, she left her lodgings, whereupon the appellant removed from the lodgings which he had taken from Mr. Hunter, and took lodgings at her house, under the pretence of giving her the advantage of his board.

She was then only 21 years of age. The appellant was about the same age; and had for some time manifested a strong attachment to her. After some time he declared his love, and proposed honourable marriage. His attentions and assiduity were unremitting, such as it was impossible to suspect,—especially with her, his own cousin, a woman of equal condition in society with himself, and of unblemished character,—that he could have any dishonourable intentions at bottom. He pressed her to marriage, but begged that it might be kept secret until he had an opportunity, upon his return to the country, of reconciling his friends, and particularly Mr. Lamond his uncle, whom he said he regarded as a father, who would object to her without any fortune. Thinking him always honourable, she at length consented to his request, and upon the 27th of February 1756, they were privately married by a clergyman, introduced by the appellant under the name of Gordon, who was a stranger to the respondent. No witnesses were present at the ceremony, neither did the respondent demand any marriage lines. They cohabited together after this at bed and board. Soon after the respondent's marriage, she found herself affected in a very extraordinary manner, and having told her case to her husband, he acknowledged that he had been the cause of her disorder. He pressed her to send for a physician, and desired that she might reveal the secret of her marriage, but the respondent refused from modesty to do so. He brought her medicines from a surgeon of his acquaintance which she took, but her cure getting on slowly, it was thought advisable that he should separate himself from her, and go

into Argyleshire. On leaving, he desired her to continue the medicines he had got for her, and when done, extorted a promise that, if not cured, she would go to Douglas, his surgeon acquaintance, and procure more. She received several letters from his mansion, couched in terms of highest regard; and inquiring when she would be able to come home to his house. One of these, dated 22d April 1756, stated, "My marriage made the damnest noise in this country that ever was heard of." She wrote him that her disease still continued. He wrote her back, enclosing a note for her to take to his surgeon Douglas, in the following terms:—

" Dear Sandy,—The bearer of this and I *being married*, April 1756.  
 " but wants to conceal it for some time, so therefore begs you  
 " will not speak of it to any person whatsoever. You know,  
 " Sandy, I had the c—p, and most unluckily gave it to her.  
 " I beg, for God sake, you'll get her instantly cured. I am,"  
 &c.

After this he wrote:

11th May 1756.

" A boat goes to Glasgow with my sisters, and will be a  
 " fine opportunity for you to come home. I beg you'll not  
 " fail to come, and I shall write you when the boat goes  
 " out."

In the beginning of August, the respondent's health was so far re-established under Mr. Stratton's care, (another surgeon,) that she was in a condition to comply with the appellant's repeated requests "*to come home*." Accordingly she intimated her intentions of setting out for that purpose. An express was sent to stop her on her journey, but missed her, and she arrived at his house. He, however, insisted that the marriage should be kept secret; she insisted on being allowed to communicate the marriage to her own mother, to whose house she retired, and where soon he disowned the marriage, and gave out that it was a falsehood. The libel concluded for declarator of marriage and adherence; failing which, for damages for seduction.

On proof, the facts above detailed being proved, and a great deal of other correspondence which had passed between the parties having been adduced:—

The Commissaries at first found facts and circumstances April 4, 1758. proven sufficient to infer a marriage between the pursuer and defender.

On reclaiming petition, they altered this interlocutor, and Aug. 14, 1758. found the facts and circumstances not sufficient to infer

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marriage, but only such as were relevant to infer damages against the defender.

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Dec. 12, 1758. proven, relevant to infer marriage. And on further petition Jan. 4, 1759. the Court adhered.

Against these two last interlocutors the present appeal was brought.

*Pleading for the Appellant.*—The story in the respondent's libel and judicial declaration is improbable, inconsistent, and proved in several particulars to be manifestly a fiction. She was much older than the appellant, had been married three years; and it is more likely that she was planning to seduce him, who was fresh from school, and thoughtless and inexperienced, than that he was attempting to seduce her. Looking to the whole proof, it is clear that the respondent has failed to prove a marriage. She alleges a private marriage, but for this there is no shadow of proof; there is no proof of cohabitation as husband and wife, nor of any facts inferring a presumption of marriage. Nor was the letter to Mr. Douglas the surgeon a deliberate acknowledgment of marriage, but written only with the view of saving the respondent's character. There was no current rumour or report of their marriage in Argyleshire, because the marriage, to which his letter to her refers, was a different marriage—a marriage with Miss MacTavish.

*Pleading for the Respondent.*—By the law of Scotland actual celebration is not essential to the constitution of marriage; the consent of the parties, or acknowledgment of their being married persons, or cohabiting at bed and board as husband and wife, being sufficient. The cohabitation of the parties in this case is acknowledged: There is also circumstances which presume a private marriage, consented to by the appellant, from the whole letters written. But further, there is an acknowledgment of that marriage in the letter to Douglas, the surgeon, so that the whole proof shows the clearest evidence of a marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For Appellant, *Ro. Dundas, Al. Forrester.*

For Respondent, *C. Yorke, Al. Wedderburn.*

Not reported in Court of Session.

[M. 4591.]

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**EDWARD MacCULLOCK,** - - - *Appellant;* **MACCULLOCK**  
**JANET MacCULLOCK,** - - - *Respondent.* **v.**  
**MACCULLOCK.**

House of Lords, 16th May 1759.

**MARRIAGE.—CONSTITUTION.—COHABITATION IN FOREIGN PARTS.—**

Held, where marriage was sought to be established by cohabitation, and habit and repute, that proof of cohabitation in the Isle of Man, where a different law prevails, did not constitute marriage in Scotland.

Declarator of marriage in the following circumstances:— The appellant and respondent were nearly related. Their fathers had each estates. They had been acquainted from infancy, and at the time when the connection was first formed, she was living with the appellant's brother-in-law, where he himself resided, and to whose family she acted in the capacity of governess. The respondent alleged that they then formed for each other a sincere and mutual love and affection, and, in consequence of the appellant's most serious and repeated addresses, a marriage was then privately concluded between them, in March 1750; but as the appellant's estate was inconsiderable, it was deemed prudent to keep it private, and, on this account, no solemnization took place. She remained in this house until she became pregnant, when she removed to her mother's. The appellant, on the other hand, averred, that while at his brother-in-law's, he slept in the summer-house, in the garden, detached from the dwelling house, which was crowded with children and servants; but the respondent got into a way of coming to the summer-house, where the appellant lay, after the rest of the family were asleep. Her first visit surprised him; but she repeated her visits, and taking care to come dressed suitably to her inclinations, only in a loose gown and smoke petticoat, at last gained her point. These interviews were, however, discovered; she was watched, missed one night out of her bed-room, and the matter being narrowly inquired into, she was turned out of the house. She retired to her mother's, big with child; and afterwards agreed to accompany the appellant to the Isle of Man. Here, it was further alleged by the respondent, they lived and cohabited together as

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man and wife, at bed and board for six months ; she bore him a child, and it appeared from the proof, that he called in a midwife and paid her. He attended the birth and baptism of the child, bespoke the godfather and godmother ; and never for an instant discovered that the child was illegitimate ; and the child was registered in the parish, without being called a bastard. A proof was led, applicable to the cohabitation and habit and repute, while in the Isle of Man. The proof led on this particular, was as follows :—First, that when they arrived there, the appellant asked for separate rooms and separate beds ;—that they slept in separate rooms and separate beds ;—that the respondent then appeared to be with child ;—that afterwards they assumed the character of man and wife,—cohabiting as such at bed and board ; this, as the appellant explained, merely as a cloak or guise, to insure her that attention and civility, during her inlying, which she could not otherwise receive. The person who baptized the child did not ask them if they were married ; but, believing them to be so, baptized the child as a legitimate child. There was no current or general report of habit and repute.—It was only vague and conjectural statements, confined to a few persons, and such as necessarily arose from their short stay in the Isle of Man ; but, to the extent to which it went, it supported a belief that they were married individuals. After leaving the Isle of Man, she returned to her mother's house in Scotland, where, on four several occasions, he visited her, and, with the knowledge of her sisters, persons of good character, slept with her.

Aug. 18, 1758. The commissaries, of this date, unanimously “ find the facts, “ circumstances, and qualifications proven, not relevant to “ infer marriage, and therefore assoilzie the defender, and “ decern.”

Feb. 27, 1759. In an advocation of this judgment, the Lords, of this date, refused the bill ; “ but remits the cause to the commissaries, “ with this instruction, that they find the marriage proven.”

Against this interlocutor, the present appeal was brought.

*Pleaded for the Appellant.*—That there was no vestige of proof of habit and repute, or cohabitation as man and wife, at bed and board in Scotland ; and the only proof of that nature, attempted to be made out, had reference to the period when they resided at the Isle of Man. That even if that evidence were otherwise competent, it is, when examined, imperfect and inconclusive, and such as can by no means establish a marriage. The manner in which they first ar-

live there,—taking separate rooms and beds,—and their afterwards assuming a different guise, shews at once the intention of parties; and gives only a vague and indistinct report of their being married, such as does not make out a sufficient habit and repute; but even supposing it to be sufficient, a proof of cohabitation in the Isle of Man, would not establish a marriage by the law of Scotland. Had there been cohabitation in Scotland, and also in the Isle of Man, the case might have been different, as in Forbes and Strathmore's case. But where the only cohabitation takes place in a foreign country, where the laws of marriage are different, the question is more deeply involved. In the Isle of Man, nothing less than actual celebration is, by law, sufficient to constitute marriage, and it being an established principle, in the laws of all nations, that the import and effect of person's actions, are to be judged of, according to the law of the country where they resided at the time; the law of Scotland could have no operation upon actions done in the Isle of Man, different from what the law which there prevails would have had. And even supposing that the contrary rule were to obtain, the cohabitation in the Isle of Man was too short in its duration, and too doubtful in character, to constitute marriage. A cohabitation for two months, which was not open, but disguised in its nature, and which was not continued, but merely adopted to serve a particular purpose, during her pregnancy and inlying, cannot be understood as sufficient habit and repute, and that habit and repute which in the law of Scotland constitutes marriage.

*Pleaded for the Respondent:*—By the law of Scotland, actual celebration is not necessary to the constitution of marriage; but marriage may be constituted by the consent of two persons agreeing to accept each other as man and wife. This consent may be either by contract in writing, or agreement by words, or by cohabitation as husband and wife, or by the acknowledgment of the parties expressed in the presence of witnesses. The marriage in the present case is established both by the cohabitation and by acknowledgment of the parties, either of which, taken separately, is sufficient. The equality of the parties' rank—the unblemished nature of the respondent's character—the near relationship—their acquaintance from infancy, preclude all ideas of their connection being other than as man and wife, and their open cohabitation, as proved for the period of six months in the Isle of Man, together with the universal pub-

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lic report of such married relation, up till he finally left her, after leaving the Isle of Man, all go to prove a marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be *reversed*, and that the bill of advocation be absolutely refused.

For Appellant, *Ro. Dundas, Al. Forrester.*

For Respondent, *C. Yorke, Al. Wedderburn.*

*Note.*—Lord (Chancellor) Hardwicke, has written this note on his papers as to the grounds of the decision.—“The grounds on which the Lords went were: 1st. That it was admitted that there was no marriage solemnized. 2d, No proof of any contract *de presenti* or *de futuro*. 3d, That almost the only evidence of cohabitation and acknowledgment was in the Isle of Man, where the respondent went clandestinely with the appellant to lie in, and conceal her shame. 4th, That the cohabitation required by law to establish a marriage ought to be *inter familiares natos et vicinos*; where one of the parties has a domicile; and it would be of dangerous example and consequence—dangerous to young girls, heirs of families, &c. that such a remote cohabitation in the Isle of Man should be allowed to constitute a marriage in Scotland.”

Right Honourable Lady Dowager FORBES, *Appellant*;  
Right Honourable JAMES LORD FORBES, *Respondent*.

House of Lords, 18th Feb. 1760.

**HEIR AND LIFERENTER—LIFERENTER'S RIGHT TO ENTER VASSALS—AGREEMENT—INTEREST—ALIMENT.**—The liferentrix of an estate having, in the erroneous belief that certain bonds of provision, executed by her deceased husband on deathbed, in virtue of powers reserved by him in his antenuptial contract of marriage, were reducible on the head of deathbed, entered into agreements restricting her own liferent provisions: 1. Held, in an action of reduction to set aside these deeds of restriction, that the deeds did not prevent her from claiming her just rights: And, 2. That as liferentrix of both the lands of the lordship of Forbes, as well as of the superiorities thereof, and the patronages thereto belonging, she was entitled to enter vassals; reversing the judgment of the Court of Session: 3. Also that, as liferentrix, she had no claim against her daughters for alimenting them until their provisions fell due; the being almented *aliunde*; and that she was not

liable to make good a sum to Lord Forbes, to whom she had assigned such claim : 4. Interlocutor *quoad ultra* reversed, without prejudice to the question concerning the interest of the heritable debts, and cases remitted to discuss reasons of reduction otherwise. 1760. —————  
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THIS was a question between heir and liferentrix, in the following circumstances :—

By marriage contract, dated 3d September 1720, between the late William Lord Forbes, on the one part, and Dorothea Dale, now Dowager Lady Forbes, the appellant, on the other, the said deceased William Lord Forbes, in consideration of £10,000 advanced as tocher with his wife, thereby bound and obliged himself to infest and seize “ him, the “ said Lord Forbes and the said Dorothea Dale, and the “ longest liver of them in liferent, for her liferent use alle-“ narly, in case she should survive him, and to the heirs “ male lawfully to be procreated betwixt them in fee; which “ failing, to the said William Lord Forbes, his other heirs “ male whatsoever, whom failing, to the heirs female to be “ procreated betwixt them with several remainders over, “ under the conditions and provisions herein mentioned, in “ all his lands and lordship of Forbes, together with the “ patronages and superiorities and feu-duties belonging “ thereto.”

The deed contained this provision :—“ That it should be “ lawful, in case there be an heir male of the marriage, and “ one or more younger children, to the said Lord Forbes at “ any time in his life, and on deathbed, to make such provi-“ sions to the said younger children as he should think fit, “ and therewith to affect and burden the said lands and “ estate, providing the same do not exceed in whole the “ sum of £3000 sterling”—“ and the heirs male succeeding “ to the estate are taken bound to pay the said £3000.”

The contract contained a procuratory of resignation in the above terms, and a precept of sasine for infesting Lady Forbes in the *whole lands and estate*, together with the *patronages and superiorities and feu-duties*, with *warrantices* of said *infestments*.

Lord Forbes died, of this date, survived by Lady Forbes, June 26, 1730. his widow, and one son *and three daughters*, having previously, on the 17th of the same month, executed a bond of June 17. — provision in favour of his three daughters, giving £10,000 Scots to the oldest, £8000 Scots to the second, and £6000 Scots to the third (in all £2000), making the said bonds

1760. payable to them and their heirs or assignees at the first term of Whitsunday or Martinmas next, after their ages of 21 years, or marriages.

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LORD FORBES. Under this settlement the appellant, Lady Forbes, was infest, but no infestment was taken at same time on the superiorities or patronages of the same. She afterwards executed a bond, in terms of the deed of entail, containing an additional provision to her daughters, amounting to £1000.

It being represented to her immediately after the death of her husband, that, after all the debts were paid on the heritable estate, the same would be nearly exhausted, she

July 2, 1730. executed a deed of agreement with her son six days after her husband's death, whereby she agreed to restrict the life-rent provisions competent to her by the marriage contract, to the liferent, or free rents and profits of his heritable estate, "after deducting the hail annual rents due and payable furth thereof, to the several creditors, who have heritable bonds, or real rights, and infestments thereupon." And she thereby discharged her son of all arrears of rents due her, on condition that he should not *question* or *impugn* the bonds of provision granted to her daughters.

The latter condition was imposed by her under the belief that the bonds were reducible on the head of deathbed, which belief chiefly induced her to enter into the transaction. On her son's death, without issue, the Respondent, his uncle, succeeded; and, under the same impression with which she

Dec. 27, 1735. had entered into the agreement with her son, she entered into a similar agreement with the respondent, restricting her claims. She was then ignorant of the contents of her marriage contract, and of her proper rights. This agreement allowed the respondent to get himself infest in special in the lands and estate of Forbes, he on his part granting a valid liferent infestment to her, with absolute warrandice, over the hail lands and estate of Forbes, and becoming bound to grant heritable bond to pay the provisions to the daughters, with interest, payable to them on their respective marriages, or on the death of their mother, or their attaining the age of 21 years complete. She on her part alimenting the daughters until their provisions became due and payable; and also paying the interest of the heritable debts, and assigning to him her claim against her daughters for arrears of aliment in maintaining them.

On being advised sometime afterwards that her daughters'

bonds of provision were not reducible on the head of death-bed; and also informed that her liferent infestment was not taken on the superiorities of the lands and patronages there-of, as well as the lands themselves, she repented having executed these deeds, and was advised to get herself feudally infest of new, so as to include the superiority of the whole lands, whereupon the Respondent brought the present action of reduction to have that infestment set aside; and the appellant, on her part, brought a counter reduction to set aside the deeds of restriction above set forth, and also for payment of the arrears of her liferent; and for declaring her right to the liferent of the superiorities and patronages of the said lands.

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These two reductions being conjoined, Lord Kames, Ordinary, of this date, held "that the obligation of the appellant to assign any claim of aliment she had against her daughters was binding on her, on the respondent implementing his part of the transaction." But the appellant having no claim for aliment against these daughters, they having been almented from their father's death, by a pension granted by Government for that purpose, the respondent insisted that she, having assigned a claim to which she had no right, was bound to make good to him a sum equal to the amount. Whereupon the Court, on the report of Lord Bankton, found, of this date, "that the appellant was not bound to make good the said sum of aliment to the respondent;" and "found that Lord Forbes was liable for the interest of the bonds of provision from the term of Martinmas 1730, being the first term after their father's death." And, on the other points of the case, their Lordships, of the same date, but by a separate interlocutor, found "the Lady Forbes liable in payment of the interest of the heritable debts affecting the estate of Forbes, in terms of the contracts 1730 and 1735, without relief against the fee of the estate; and find that she has not the right of entering vassals, nor of presenting ministers, but that she has a right to the feu-duties payable by the vassals of the estate, and that she has a right to all the emoluments arising from the right of patronage." On a reclaiming petition against the first of these two interlocutors, the Lords, of this date, found "the Lady Dowager of Forbes is obliged to pay to Lord Forbes a sum equal to the aliment of her daughters, till their majorities or marriages."

Aug. 2, 1758.

And thereafter the Court, of this date, found "that Lady Mar. 9, 1759.

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**LADY FORBES** "Forbes' daughters, Mrs. Jean, Maria, and Mrs. Elizabeth Forbes, are each of them entitled to an aliment of £20 sterling yearly, from 26th June 1730, being the time of their father's death, till they attained to the age of seven years; and of £30 sterling yearly, from that time till they were twelve years old; and after that age, that each of them is entitled to an aliment equal to the full interest of their several portions till their respective majorities or marriages."

Against these three last interlocutors, Lady Forbes brought the present appeal, in so far; 1st, As they find her liable to make good to Lord Forbes the claim of aliment assigned by her to him. 2d, In so far as they find her liable in the payment of the interest of the heritable debts, without relief against the fee of the estate; and. 3d, In so far as they find that she had not the right of entering vassals, and presenting ministers to vacant churches, in virtue of her liferent right of the estate.

*Pleaded for the Appellant* :—1st, As to the *aliment*.—That the appellant's claim against her daughters for aliment could arise only from the provision made for them by their father. Happily for mother and daughters, they were discharged of that burden by the King's bounty, (proved in these cases), which gave them £200 per annum for maintenance and support; and, consequently, no action and no claim lie at the instance of the appellant against her daughters on account of their aliment; for they must be presumed to have alimented themselves. Her assignation, therefore, of this claim fell to the ground; and the judgment, finding them entitled to certain sums from certain ages was therefore ill founded in law. 2d, As to her right of relief against the fee of the estate for interests, both of arrears and of accruing payments of her whole jointure, as well of heritable debts paid by her, she is entitled to stand in the place of a creditor; and, consequently, to come against the inheritance for reimbursement thereof. 3d, As to the superiorities and patronages, she never gave up them. The indentment taken for her in 1731 was a fraud, from which she had a right to be relieved, and so indeed the decree partly admits, by giving her the feu-duties payable by the vassals. But the same principle which entitles her to these, entitles her also to the right of entering vassals, and presenting to vacant churches, these being what her husband enjoyed at his death. Nor does the appellant understand what are the emoluments arising from the right of patronage allowed her by the de-

cree, unless it be the right of presenting to vacant churches. 1760.  
On these grounds, and also because the whole transaction was gone into, on the supposition that her daughters' bonds of provision were reducible on the head of death-bed, the deeds of restriction executed by her sought to be reduced, ought to be set aside, and her rights be declared to exist as fully as her husband settled them by the contract of marriage.

*Pledged for the Respondent.*—*1st*, The validity of the two deeds of restriction executed by the appellant being established, the import of the obligation to aliment the daughters, and to assign to the respondent the value of their aliment, must be taken according to the intent of the parties, and the true spirit and meaning of the agreement; and from the terms of this agreement it was manifest, the appellant meant to substitute the aliment and education in place of the interest of the provisions, that the one might compensate and be set off against the other: So that the reason for giving the respondent the benefit of the clause of aliment which might arise against the daughters, was to indemnify him against the demand of interest on their provisions; and as the respondent has been subjected in the whole interest, therefore, according to the true intent of the agreement, the respondent is, in law and equity, entitled to an equivalent for the claim of aliment bargained for; *2d*, In regard to the interest of her jointure, and the interest of the heritable debt or incumbrance upon the estate, she, as liferentrix, was bound in law to keep down the interests accruing during her possession; and, separately, she was also bound, by special agreement, to do so, and therefore she can have no relief for these against the inheritance. *3d*, With respect to the superiorities and the patronages of churches, she is found entitled, by the interlocutor complained of, to the feu-duties, to the casualties of superiority, and to all the emoluments arising from the right of patronage; but as a liferentrix, she is not entitled to present to the churches, nor to grant charters, the exercise of these rights being inherent in the proprietor of the fee. The power of granting charters to vassals, and of presenting ministers to churches (from which she is excluded) yields no profit or advantage whatever, and was certainly meant, as in justice it ought, to accompany the right of property and title of honour belonging to the representative of the family. As liferentrix, therefore, she is not entitled to the powers properly inherent in the fee and owner-

1760. ship of the estate, and so cannot enter vassals. After hearing counsel, it was

**LADY FORBES** *v.* **LORD FORBES.** Found and declared that the said interlocutors complained in the appeal be reversed; but that the reversal be without prejudice to the question concerning the interest of the heritable debts affecting the estate of Forbes, when the reasons of reduction shall be heard and discussed pursuant to the directions hereinafter given: *And it is hereby declared that the appellant has the right of entering vassals, and of presenting ministers, upon the estate in question; and it is ordered, that so much of the first interlocutor of the 2d August 1758, as finds "That the Lady Dowager Forbes is not liable to make good a sum to Lord Forbes in consideration of an alment to her daughters, in respect that, before the contract 1735, and thereafter, they were almented *aliunde*" be confirmed: And it is further ordered and declared, That the causes be remitted back to the Court of Session, and that the said Court do hear and discuss the reasons of reduction in both suits, and proceed therein according to law and justice. And it is also ordered that the Court of Session do give all necessary directions for carrying this judgment into execution."*

For Appellant, *C. Yorke, Al. Forrester.*

For Respondent, *John Morton, Alex. Wedderburn.*

*Note.*—One point decided here seems to strike against the doctrine laid down by the authorities, namely, that a liferenter, by constitution, has no power to enter vassals. The compiler has made great efforts to ascertain the precise grounds of the reversal without success. Lord Hardwicke has left no note of the grounds of the reversal, although from the notes of the argument taken by him, he seems to have presided for the Lord Chancellor Northington, in disposing of the case. Nothing appears to throw light upon the point; but it may be conceived to have proceeded on these principles:—That this is the liferent of the superiority of lands, specially conveyed by the grantee to himself and wife, and the longest liver of them in liferent, for her liferent use allenarily, and to the heirs male of the marriage in fee. That by such conveyance, the wife has as full a liferent as the husband. And as in the conveyance of superiorities, the lands themselves in *feudal form* are always conveyed, such a liferentrix may be considered in a situation to grant a *renovatio feudi*, and to enter vassals after the husband's death. This is not a conjunct fee and liferent; but Erskine, B. II. T. 9,

§ 42, says, " In conjunct fees granted to husband and wife, the wife's right is, in the general case, considered merely as a liferent, which dies with herself; yet, as she is, *by the form of the right*, entitled to the fee equally with the husband, her liferent is as amply extended as a liferent by reservation."

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FORBES OR  
MAITLAND  
v.  
GORDON.

Unreported in Court of Session.

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Major ARTHUR FORBES, now taking the name }  
of MAITLAND - - - - - } Appellant;  
WILLIAM GORDON, Trustee of KATHERINE and }  
ANN MAITLAND - - - - - } Respondent.

House of Lords, 24th March 1760.

**DELIVERY OF DEED—PRESCRIPTION—CONFUSIO—BONA FIDE CONSUMPTION—INTEREST OF DEBT.**—Circumstances in which held, 1st, That debts acquired by a husband affecting his wife's estate, do not prescribe during marriage; and that prescription does not run against these bonds during the minority of the person for whose behoof they were purchased. 2nd, That a bond of provision granted by a brother to two sisters, in addition to their family provisions, was to be presumed in law delivered of its date, unless the contrary be proved, although it had not been delivered to them, and there was no clause dispensing with delivery. 3d, That this bond of provision was onerous to the full extent. 4th That the sums in said bonds were not diminished by the sisters having been almented by their mother, while in family with her. 5th, That the rents of the estate during Katherine's possession were *bona fide percepti et consumpti* by her, and she not accountable therefor; But, 6th, That she was not liable for behaviour as heir, but that the appellant was liable for principal and interest of the sister's bonds, under the deduction of two-thirds of the annual rents, from their mother's death to their brother's death, in consideration of the aliment and necessaries furnished them by their brother.

For the particulars out of which the present action arises see report, p. 570 and 628, ante Craigie and Stewart.

The appellant having prevailed in that suit, was then entitled to possession of the estate, of which he had been deprived, as heir male of the original investiture, but the estate having, in the meantime, been taken possession of by Katherine Maitland, and she, in order to frustrate his obtaining possession, having along with her sister Anne, conveyed their first bonds of provision to the respondent Gordon, as trustee for them, adjudication of the whole estate was rais-

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ed, and charter and sasine, and decree of mails and duties were obtained.

Thereafter an action was raised by the respondent, to whom Katherine and Anne Maitland had assigned, as their trustee, the 25 old bonds which their father, Baron Maitland, had purchased up against the estate for behoof of his son Charles, and to which they, after Charles' death, had succeeded. The title to raise the action was supported by confirmation, to an additional bond of provision, granted them by their brother Charles.

In defence to this action, it was stated, 1<sup>st</sup>, That all the old bonds were prescribed, no document having been taken upon them since they were granted 50 years ago. 2<sup>d</sup>, That Jane Maitland, who succeeded to the estate after Sir Charles, her brother, was personally liable for his debts, which these 25 old bonds were, and her son Charles, as representing both her and her uncle, was placed precisely in the same situation, and as the rights of debtor and creditor in regard to these bonds met in him, the bonds thus became extinguished, *confusione*. 3<sup>d</sup>, That supposing these bonds still subsisting, no interest could be chargeable upon them from 1721 till 1747, during Jane Maitland's possession as heiress of entail, because she, as heir of entail, was bound to keep down the interest of debts during her possession; Charles, her son, who succeeded her, was bound by the same obligation. 4<sup>th</sup>, But supposing the old debts still subsisting, and were to be considered the personal estate of Sir Charles; yet the appellant, who represented him merely as heir of entail, must have relief and retention to the extent of the *onerous* debts of Charles. 5<sup>th</sup>, That the bond of provision, granted by him to his sisters, was never delivered and not onerous, and so could not form a good ground for confirmation, or title to raise the present action as his executor.

Feb. 3, 1757. The Court, of this date, repelled the objection made to the non-delivery of the bond of provision, by Charles Maitland to his sisters, being the title of the confirmation, and find that the bond, being in satisfaction of former bonds, and in full of their legitim, are presumed to have been delivered of that date, unless the contrary is proven. And, as to the old bonds, they also repelled "the retention and relief pleaded by the "appellant, and found him liable to pay the principal sum, "and interest from 1721, when Baron Maitland died, to Oc- "tober 1741, when Jane died, but no interest was due during

"the time Charles possessed the estate." The defence of prescription was also repelled.

The Court again pronounced this interlocutor.—"Find "that the bond of provision granted by the deceased Mr. Charles Maitland, to his sisters, Katherine and Anne, "which is the ground of the confirmation, was an onerous deed, to its full extent, and in so far adhere to the former interlocutor. Find that the sums in the said bond were not diminished by the ladies having been almented by the deceased Lady Pittrechie, while they staid in family with her, during her life; but find that after the Lady Pittrechie's death, and during the time the young ladies staid in family with Mr. Charles Maitland, their brother, which was from October 1746 to February 1751, their aliment in Charles Maitland's family, and any furnishings for clothes during that time, falls to be deducted from the annualrent of their bond, and they modify the said aliment and furnishings during that time, to two-thirds of the current annualrent of their respective provisions, during the period of Charles Maitland's life, after the mother's decease; and find that the annualrents fully due on Katherine's provision during the time she possesses the estate of Pittrechie, after her brother's death, are extinguished by her intromissions with the rents of the estate during that period; and find that the rents of the estate of Pittrechie, from Charles Maitland's death, to the 9th of Aug. 1753, being the date of the interlocutor of the Court in the defendant's process for the estate, were *bona fide percepti et consumpti*, by Mrs. Katherine Maitland, and that she is not accountable therefor; but find that during possession she is chargeable with the annualrents in the bonds pursued for, and remit to Lord Auchinleck to proceed accordingly." By the same interlocutor, the Court found that Mrs. Jean Maitland, as heiress of entail, was bound to keep down the *interest of the old bonds, during her possession*, but as she failed to do so, her son Charles was not bound to pay any interest during her possession; nor to any deduction on account of Charles being almented by his mother during his minority, for that *post tantum temporis* such claim is presumed to be satisfied.

On reclaiming petition, the Court adhered, "with this variation, that Katherine Maitland's *bona fide* possession of the estate, ceased upon the 13th July 1753, the date of the first interlocutor, (in the appellant's process for the

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"estate), and as to the defence of retention and relief : find,  
"that after payment of what is due to Katherine and Anne  
"Maitland, on their bond of provision, the ground of confir-  
"mation, out of the sums confirmed, Major Maitland is en-  
"titled to retention and relief out of the remainder of the  
"sums confirmed, for all debts of Charles Maitland he hath  
"paid, or shall pay."

Action was then dropt by the respondent for the old bonds, and new one brought for the additional bond of provision granted by Charles Maitland in 1728, which new action being remitted to the former action on the old bonds; the respondent then insisted that the cause should be disposed of on the bond of provision, and the question in reference to the old bonds remitted to the Lord Ordinary ; to which the appellant objected, insisting that as the litigation had existed for nearly six years on the action upon the old bonds, in which the bond of provision was only relied on as the ground of the respondent's title by confirmation, not as a claim of debt ; and as the proof then to be taken into consideration was granted in the action upon the old bonds, the appellant, in material justice, was entitled to judgment upon the whole proof.

July 13, 1759. Of this date, the Lords of Session pronounced an interlocutor : "The Lords having advised the state of the process, &c. repel the defence against payment of the sums in the bond of provision pursued for, founded on Mrs. Katherine Maitland's alleged behaviour as heir to her brother, by intromission with the rents of Kinmundy : Find the defendant liable to pay the pursuer the sum of 10,000 merks provided by the said bond to Catherine Maitland, and of the sum of 9000 merks thereby provided to Anne, with a fifth part more than the said respective sums of penalty, in terms of the bond, and the legal interest of the said principal sums from their respective majorities, under deduction of two-thirds of the annualrents of both provisions from the death of Lady Pittrechie, their mother, in October 1745, to the time of their brother Charles Maitland's death, in February 1757, in consideration of the aliment and necessaries furnished them by their brother during that period, and also with deduction of the annualrents of Katherine Maitland's provision from the time of her brother's death to the 13th July 1753, when the estate of Pittrechie was decerned to belong to the defender, in terms of the former interlocutor ; and find it proven that

" Katherine Maitland attained the age of 21 years on the  
 " 3d March 1732; and that Anne Maitland attained the said  
 " age on 18th of August 1735, and that the above provisions  
 " due to them bear interest from the said respective periods  
 " during the nonpayment, with the deductions aforesaid;  
 " and find the defendant is further entitled to have deduc-  
 " tion of the sum of £339. 9s. 2d. Scots received by the pur-  
 " suer from John Innes out of the rents of Kinmundy, and  
 " decern accordingly, and remit to Lord Auchinleck to in-  
 " quire into the extent of sums due on the 25 old bonds  
 " granted by Sir Charles Maitland, and to determine and  
 " report." The claim for the old bonds being departed  
 from; it was again urged in a petition that the profits of the  
 estate during Katherine's possession should be imputed in  
 payment of her provision. The majority of the Court were  
 inclined to listen to these claims; but these points being  
 already determined by two consecutive interlocutors, the  
 Court adhered to their former interlocutors.

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Aug. 4, 1759.

Against the interlocutors of 3d Feb., 3d Aug., and 1st Dec. 1757, and 15th July and 4th August 1759, repelling the objection to the delivery of the bond of provision, finding it presumed to be delivered of the date unless the contrary be proved; finding that it was an onerous deed to its full extent; finding that the sums in the said bond are not diminished by Katherine and Anne having been alimented by their mother while in family with her; finding the rents of the estate during Katherine's possession were *bona fide percepti et consumpti* by her, and not accountable therefor; repelling the defence of Katherine Maitland's behaviour as heir, and finding him liable for the full sums and annual rents in the bonds, the present appeal was brought.

*Pleaded for the Appellant.*—By the law of Scotland, no deed is valid without actual delivery, or a clause therein dispensing with delivery; and even where the rule of law presumes delivery from the deed being in the grantee's hands, yet this is a presumption which is made to yield to contrary proof, and if evidence is adduced to show that possession was obtained, not in the due course of delivery, or that the deed is in the grantor's hands for some different and specific purpose, *that* presumption will not hold. It was incumbent on the respondent to prove *that* delivery, not on the appellant to prove non-delivery, which is the negative. But, assuming the delivery of the deed to be made out, yet the additional bond granted by Charles to his sisters was gratuitous,

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and therefore void, he having no power to affect the entailed estate, and the sisters being already provided for by their father's provisions in 1721. And, 2d, Supposing it good, and to be held as delivered, yet there is no good ground to charge the appellant with interest from the year 1732 and 1736, when Katherine and Anne Maitland came of age, to 1751, when Charles Maitland, their brother, died, because during that time they were alimented *aliunde*; and, besides, there ought to be deduction allowed for the reaping of the fruits during Katherine Maitland's possession of the estate, which, in the circumstances of this case, was not, and could not be a *bona fide* possession; and on these grounds he ought to have relief and retention to that extent.

*Pleaded for the Respondent*:—The claimants have an equitable claim to a moderate provision out of an ample estate, to which they ought to have succeeded as heirs of line. The additional bond granted by their brother was granted, he having full powers to do so. It was a delivered writ; and a writ which, if it had not been delivered, would have been effectual without delivery. It was of the nature of a mutual contract, granted for a valuable consideration, and in corroboration of a former deed executed by Baron Maitland, which it is admitted was delivered. But, in point of fact, the bond here in question was delivered. It was given to their mother for their behoof. It lay in her repositories as for them; and the law always presumes delivery of family deeds, unless the contrary be proved. The *onus* of proving the deed a non-delivered deed lay on the appellant, who objects to the same. And the possession of Katherine Maitland of her brother's estate being on a *bona fide* title, she was entitled to the fruits as *bona fide percepti et consumpti*, and nothing can be founded on that possession either of passive title or otherwise, because her *bona fides* protected her.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed.

For Appellants, *C. Yorke, Fred. Campbell.*

For Respondents, *Ro. Dundas, Al. Wedderburn.*

*Note*.—The first branches of this case are reported, Fac. Dec. p. 101.

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[M. 15,412, et Kames' Dec. p. 222.]

WILLIAM EARL OF RUGLEN and MARCH, - *Appellant;*  
 Sir THOMAS KENNEDY (claiming the title) and dignity of EARL OF CASSILS,) - } *Respondent.*

E. OF RUGLEN  
v.  
KENNEDY.

House of Lords, 19th May 1760.

ENTAIL.—When an estate entailed is possessed by the last substitute, it becomes in him a fee-simple estate; when failing him, it devolves upon heirs whatsoever.

JOHN EARL OF CASSILS, by marriage articles, of this date, June 15, 1697. entered into, in contemplation of his son, Lord John Kennedy's marriage with Mrs Elizabeth Hutchison, the said Earl and Lord Kennedy became bound to settle lands to the yearly value of £1500 per annum in favour of the said John Earl of Cassils in liferent, and the said Lord John Kennedy, and the heirs-male of the said intended marriage in fee; which failing, to the heirs and substitutes therein named, declaring that the said lands, to the extent of £1000 of yearly rent, should be conveyed in the form of a strict entail, with the usual prohibitory, irritant, and resolutive clauses.

In conformity with the obligation contained in the above marriage articles, a settlement by entail was executed by John Lord Kennedy, with consent of John Earl of Cassils his father, of the lands in question, in the following terms:

—“ To and in favour of the said John Earl of Cassils in life- Sep. 5, 1698.  
 “ rent, during all the days of his lifetime; and the said Lord  
 “ John Kennedy his son, in fee, and the heirs-male lawfully  
 “ procreated, or to be procreated, of his body, on the body  
 “ of the said Elizabeth Lady Kennedy; which failing, the  
 “ heirs-male lawfully to be procreated of his body on any  
 “ other wife to be by him hereafter taken; which failing,  
 “ the heirs-male lawfully to be procreated of the body of  
 “ the said John Earl of Cassils, on any wife taken, or to be  
 “ hereafter taken by him; which failing, to the eldest  
 “ daughter of the said Lord John Kennedy, begotten, or to  
 “ be begotten by the body of the said Elizabeth Lady Ken-  
 “ nedy, and the heirs-male lawfully to be procreated of the  
 “ body of such eldest daughter; which failing, the second  
 “ and every other daughter and daughters of the said Lord  
 “ John Kennedy to be begotten on the body of the said  
 “ Elizabeth Lady Kennedy, and the respective heirs-male  
 “ lawfully to be procreated of the body of every such daugh-

1760. " ter or daughters; which failing, to other substitutes

**E. OF RUGLEN** " named; and which all failing, to the heirs and assignees  
v.  
**KENNEDY.** " whatsoever of the said Lord John Kennedy."

John Lord Kennedy had issue of the foresaid marriage only one son, John, who became the last or late Earl of Cassils. He intermarried with Lady Susan Hamilton, daughter of the late Earl of Ruglen or March (his cousin), and entered into a contract of marriage with her, by which the lands in the above entail, to the extent of £1000 per annum, and other lands, were provided " to himself and the heirs-male of the said marriage; which failing, to the heirs-male to be procreated of the body of the said John Earl of Cassils in any subsequent marriage, and other substitutes; including the heir-male of the bodies of Lady Anne Kennedy, married to Earl of Ruglen and March." It was also provided, " That it shall not be leising or lawful to, nor in the power of the said John Earl of Cassils, nor any of the substitutes succeeding to the said lands and estate, to alter, change, or innovate the destination or order of succession appointed to the said estate, by the destination above written."

Of this marriage there was no issue; and, having no prospect of issue, and the heirs of entail who could claim under the marriage settlement of 1698 being all extinct, he, before

**Mar. 29, 1759.** his death, executed, of this date, a new settlement in favour of the respondent, the nearest heir-male and representative of the family. He died, of this date, upon which the appellant,

**Aug. —** William Earl of Ruglen and March, claimed to succeed, in virtue of the entailed settlement of 1698, as heir whatsoever of John Lord Kennedy; and the question was: Whether an entailed estate becomes a fee simple estate when it descends to the last substitute or heir called, previous to going to heirs whatsoever?

The appellant insisted, in a reduction of the latter deed, that as the entail 1698 prohibited the whole heirs of entail " to alter, innovate, or change the order of succession thereby established," and as the late John Earl of Cassils was an heir of entail, he could not alter. He was further prohibited, by his own marriage settlement 1739, from so altering.

**Mar. 29, 1760.** The Judges, when they came to give judgment in this case (14 in number), were almost equally divided. They found

" that the said deceased John Earl of Cassils could legally execute the settlement under reduction; and therefore

"repelled the reasons of reduction, and assailed the defendant (*i. e.* respondent) therefrom, and decerned and stopt all further procedure in the said service."

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Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant:*—By the law of Scotland, every man has the power of entailing his estate to any series of heirs he thinks proper. The most simple form of entail known in the law is, when a man devises his estate to a series of heirs in tail, under a prohibition laid upon these heirs not to alter the order of succession; such entails are the most favoured in the law; they require no irritancies to render them effectual; for the simple prohibition has the undoubted effect, by common law, of securing every substitute, or heir in remainder, against every gratuitous alteration of the succession to their prejudice. But the entail in question, and under which the appellant claims, contains, besides prohibitions to alter the order of succession, also prohibitions against contracting debt, or alienating the estate for the most onerous cause; and, under proper irritant clauses, declares the contravention thereof to be a forfeiture of the right. The late Earl of Cassils therefore, having possessed the estate as heir of entail, under such prohibitions and irritant clauses, directed against altering the order of succession, could not in law make a new settlement of the estate, altering said order of succession, so long as there was an heir of entail alive, and ready to take the estate under the entail; and the appellant, being such an heir of entail, is entitled to succeed accordingly.

*Pleaded for the Respondent:*—The appellant is not an heir of entail, who in law is entitled to enforce the limitations of the entail. The appellant's title is in the character of one of the heirs-portioners, or heirs whatsoever, of John Lord Kennedy. Such heirs-portioners are considered as heirs of simple destination. An heir of entail is such an heir as can only take under all the qualities and provisions of the entail; but it is admitted that the appellant is not such an heir as could be bound by the limitations of that entail, and therefore, in the eye of law, he cannot be an heir of entail. As, therefore, he cannot avail himself of the limitations, to which he confessedly is not subject, he cannot be heard to plead any objections to the alteration of the succession, which is a privilege only allowed to heirs of entail. The late Earl of Cassils was the right heir of Lord Kennedy

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his father, and would have taken the estate independently of the settlement of 1698. When he executed the settlement sought to be reduced, both characters were in him. He was heir of entail and heir whatsoever. The heirs of entail were all extinct except himself. There were no issue of his own body, and the moment that the heirs of entail were exhausted, the fetters of the entail flew off, and he, the last substitute of entail, possessed the estate in fee simple. He was then in a condition by law, to alter the order of succession, and entitled to make a new settlement.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor be, and the same is, hereby affirmed.

For Appellant, *Tho. Miller, Al. Forrester.*

For Respondent, *C. Yorke, Alex. Lockhart.*

*Note.—Lord Hardwicke has written this note on his papers in deciding this case. "Vide the case of Gordon of Park, decided in the House of Lords May 21, 1751; and question, What influence this judgment will have as to the forfeiture of such substitutions, to heirs whatsoever, for high treason?"*

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[Brown's Supp. to Mor. p. 869, et M. 15,609.]

The Right Honourable JOHN EARL of ROTHES,  
the Right Honourable WILLIAM LORD Vis-  
COUNT BARRINGTON, of the Kingdom of Ire-  
land, and others, - - - - - *Appellants;*

JOHN PHILIP, Esq., Auditor of the Revenue in  
Scotland, - - - - - *Respondent.*

House of Lords, 16th January, 1761.

**ENTAIL—RECORDING.**—Held that the Act 1685, authorizing the recording of entails, applied to entails executed before that Act was passed, and that such entails were not good against creditors unless recorded.

Margaret, Countess of Rothes, daughter and heiress to John, Duke of Rothes, executed a procuratory in the form of a strict entail of her estates of Rothes in 1684.—Upon Jan. 1, 1684. which charter passed under the great seal in 1687; and in March 1689 indentment was taken thereon.

In the year 1685, the statute passed concerning entails

enjoining that they be registered in the register of tailzies, otherwise to be null and void.

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The entail in question, which was executed *before* the date of this act, was not recorded in terms thereof in the register of tailzies; and the question was, whether the entail was good against creditors, it not having been recorded? The respondent, as a creditor, insisted that it was not. The appellants contending that the act 1685 did not apply to entails executed as this was, before the date of the act.

The Lords, of this date, pronounced this interlocutor, Mar. 8, 1760. find, "That the provision of succession of the estate of Rothes, "in the marriage contract between the Earl and Countess, "in favour of the heirs of the marriage, can be no bar to the "pursuer's (i. e. the respondent) having access against the "estate, for payment of the debts pursued for; and decreed "and declared accordingly. Without prejudice to the "Countess, to affect the estate upon her liferent infestment; "and the younger children to affect the same by diligence "for their provisions in the contract of marriage, as accords "of law."

Against this interlocutor, the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—That the act 1685, as to the registry of entails, has no retrospective operation,—has only place *in futurum*, and consequently, does not apply to the present entail, which was executed before the date of the act, and which, therefore, must stand good and effectual to all intents and purposes. Such has been the rule adopted in several cases, with reference to entails executed before the act, upon a sound construction of the statute, and such ought, therefore, to be the rule of construction applied to the present case. If a contrary rule were adopted, it would undo every old entail, of which there must be many prior to the date of the act, which would evidently be contrary to every principle of justice. The appellant here took up his estate, as an entailed one; his right was secured against creditors and every one, by the general opinion of the country, and by the determination of the courts of justice for half a century; and it would be hard if, in these circumstances, the entail were not to protect the appellants against creditors.

*Pleaded for the Respondent.*—As all restraints on property are unfavourable, entails, which restrain the proprietor from full enjoyment, and his creditors from having access to his

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estate, ought to be judged of *stricti juris*. Even so unfavourable are they, that before the year 1685, it was much doubted, whether entails, with prohibitive, irritant, and resolutive clauses, were effectual against creditors and purchasers at all; but after the decision in 1662, in Stormont's case, the Court of Session held them good against creditors. The act 1685 in question, enjoining the recording of entails, is not only statutory, but declaratory, without distinguishing between entails made before or since its existence. It was easy, as is common, to have inserted a clause, saving existing rights; but comprehending, as it indoubtedly does, all entails, both those before as well as those after the act, no such clause appears; but it declares, such tailzies only shall be allowed, as are recorded in terms of the act. In regard to those entails, executed before the act, it undoubtedly intended that they should be all registered, against which there could be no possible obstacle—no difficulty, and therefore no hardship pleadable whatsoever. Besides, sasine did not follow until after the date of the act.

After hearing counsel, it was

Ordered, adjudged, and declared, That entails created of lands in Scotland, with prohibitive, irritant, and resolutive clauses, before the making of the act of Parliament concerning tailzies in 1685, ought to be recorded in the register of tailzies, according to the said statute. And it is therefore ordered and adjudged, that the said petition and appeal be dismissed, and that the said interlocutor be affirmed.

For Appellants, *Thomas Miller, C. Yorke.*

For Respondent, *Al. Forrester, Al. Wedderburn.*

*Note.*—Lord Kilkerran says, “The Lords of Session found that the tailzie in question ought to have been recorded, and not having been recorded, it is not effectual against a creditor. Had a question been stated on the general point, how far the act 1685 was to be understood to require the registration of tailzies that had been completed by infestment before the date of the act, it appeared to be the opinion of the plurality, that the act 1685 did not require the registration of such anterior entails, though I was one of those who thought it did, as was also Kames, Colston, &c.; but indeed there was no occasion to determine it, for though, where there are more points in a cause, the Lords determine the whole points, nor can they refuse to do so in justice to the parties, yet, still they only determine points that are in the case; whereas this general point was not a point in the cause; and as many of the Lords, who thought the regis-

tration not necessary of a tailzie completed by infestment before the act, thought the tailzie in question was to be taken as a tailzie made after the act, as being to be considered as no earlier made than it was completed by sasine: on the vote put, in general, whether the tailzie in question needed to be recorded, it, by a considerable majority, carried as above, against the opinion of the President."—*Vide* Brown Supp. Kilkerran, p. 366.

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KENNEDY  
v.  
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SIR THOMAS KENNEDY, Claiming the Title, } Honour, and Dignity of EARL of CASSILS, } Appellant;  
EARL of RUGLEN and MARCH also Claimant, Respondent.

House of Lords, 26th January 1762.

**P**RERAGE—**S**UCCESSION TO.—When the dignity of the Earldom of Cassils was first created, (1509), written patents of nobility were not introduced, containing special limitations of the descent. The Cassils' family estates, according to the investiture, bore at this time to be in favour of heirs general, or heirs of line. Afterwards, and in the year 1671, resignation was made into the hands of the Crown, and a new charter procured, bearing to be in favour of heirs male, whom failing, to heirs female of his body "cum armis et dignitate familiæ de Cassils."—Held, 1st, Where no express limitation, or descent of the grant appears, the dignity is always presumed to descend to the heir male. 2d, That the resignation and new charter 1671 did not comprise, or extend to the honours, but only to the estate.

**T**HE first creation of the Cassils peerage was in 1459, in favour of Gilbert Kennedy, who was grandson of Robert III. King of Scotland, (by Mary Stewart his daughter), by the title of Lord Kennedy. David Kennedy, Gilbert's grandson, was afterwards created *Earl of Cassils* by King James IV. in 1509.

At this time, written patents of honour had not been introduced, these dignities being conferred by the sovereign himself, in parliament, without any writ, limiting the descent of the honour in any particular way, or on any particular heirs; and, as service in parliament, fidelity and homage were due in consequence of the dignity so conferred; these were always understood to descend, according to the rules of the feudal law, to the heir male of the person first ennobled, unless *heirs whatsoever*, or *heirs female*, had been particularly called to the succession.

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E. OR RUGLEN. Previous to the creation of the peerage, the estates were destined to heirs male. In 1540, after the creation, the third Earl of Cassils obtained a charter from King James V. granting the whole estate and barony of Cassils, and other lands therein mentioned, to him and the heirs male of his body; which failing, to Thomas his brother, and the heirs male of his body; which failing, to David, Quintin, Archibald, Hugh, and James Kennedy, his brothers successively, and the heirs male of their bodies; which failing, to James and Thomas Kennedy his uncles, successively, and the heirs male of their bodies; which failing, to Hugh Kennedy of Girvin Mains and others, and the heirs male of their bodies; which failing, to the lawful and nearest heirs male of the said Gilbert Earl of Cassils; whom all failing, to his nearest and lawful heirs female whatsoever.

The estate and barony, and the title and dignity of Earl of Cassils, descended in the male line, from the said Gilbert, the third Earl, to John, the eighth Earl of Cassils, who died the 8th of August 1759 without issue. And upon his death the claimant, Sir Thomas Kennedy, being the nearest heir to him, as lineally descended from Sir Thomas Kennedy of Culzean, the second son of Gilbert, the third Earl of Cassils, who was grandson of David, first created Earl of Cassils in 1509.

The Earl of Ruglen again claimed, as being nearest heir general, or of line, of David, the first Earl of Cassils, being the great grandson of John the seventh Earl of Cassils, by Anne Countess of March, the daughter of Anne Countess of Ruglen, who was the oldest daughter of said John Earl of Cassils.

He insisted that where no patent exists, the descent of the title of honour must be regulated by the descent of the family estate; and upon this principle, the investiture of the family estate, as it stood at the time of the creation of the earldom, must give the rule for the descent of the dignity and honour; and being in favour of heirs general, or heirs of line, as appeared from several charters of the lands, conceived in the terms "*haeredibus suis*," he had best right to succeed. To this it was answered, That the respondent was an heir female; and the dignities and honours, unless limited by writ, descend to heirs male. That these charters could be of no avail, as they bore reference to the ancient title, and expressly specified, that the estate is to be holden by his heirs *secundum tenorem antiquarum infeodationum*.

*eis desuper confect*; which simply meant the heirs of the former investiture.

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Pledged for Sir Thomas Kennedy:—Feus of lands anciently, before charters or grants in writing were introduced, were conferred by investiture, in presence of the *pares curiae*, until the reign of James the Sixth, when patents were first introduced. Before then the dignity of earl was conferred by the sovereign himself in parliament, by Cincture, or Girding the person ennobled with a sword, and by proclamation made by heralds. As in feus of lands military service was due by the vassal to the over-lord, or superior; so in dignities, the person ennobled was bound to perform service in parliament, and to give fidelity and homage. As feus of lands, before the descent was limited by grants in writing, descended to heirs male, so dignities descended to heirs male, and could not be aliened, or transferred, in any way but by resignation into the hands of the sovereign. Heirs male were the parties to whom both descended, until, in process of time, the feudal law was so relaxed, as to admit of a conveyance to heirs whatsoever, under which denomination female heirs were included. But, in order to this effect, it required an express grant to heirs female, or to heirs whatsoever. No doubt the Earl of March founds upon the resignation to the Crown, for a new charter, and upon the charters 1642 and 1671, whereby, he contends that both the title and dignity were conveyed expressly to heirs general; yet several objections occur to this, 1st, These charters, and ratifications thereof, can have no effect to alter the legal descent of the title of honour and dignity, from the heir male of the family, because, from the procuratory of resignation, upon which the charter 1642 proceeded, it clearly appears, that the title of honour and dignity was not resigned by the Earl of Cassils, into the hands of the Crown, and, of consequence, no new limitation could be made by this grant. 2d, It appears from the signature or warrant of the charter, that it was not superscribed by the King, which was indisputably necessary; and, accordingly, the charter was only granted by the Lords of Exchequer, who had no power to receive resignations, or make new grants of titles of honour. 3d, The charter 1671 proceeds upon the procuratory of resignation, contained in the marriage settlement between John Earl of Cassils, (the son of the former Earl John, who obtained the charter 1642), and Lady Susan Hamilton. And as there is no warrant for resigning the dignity, nor is it once mentioned

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in the marriage settlement, most certainly no alteration could be made of the descent of the title of honour. For although resignations of this kind are peculiar to Scotland, yet no instance ever occurred of a new limitation made of honours without a special resignation. 4th, As the *lands* and *estate* were only resigned by the Earl of Cassils, so the doquet subjoined to the original signature, contains only a special description of the whole lands, without any mention of the title of honour or dignity. 5th, The words of the charter 1642 cannot by the most strained construction, import the grant of a title of honour. The creation of the lands into a *lordship* and *earldom*, to be possessed by the earl of Cassils, and his heirs, "according to the precedence and priority of place, " due and competent to them by their rights, and the laws "and practice of Scotland," can confer nothing more than the common territorial jurisdiction belonging to lands so distinguished, but no more; and the ratifications of these charters by Parliament were mere matters of form. It was therefore clear that the claimant, Sir Thomas Kennedy, is the undoubted heir male of the family of Cassils, lineally descended from the person first ennobled in 1509; because the descent of titles of honour conferred without patent, must be regulated by the feudal law, which always preferred the succession of heirs male, so long as any existed. It also appears from a variety of instances, in many noble families in Scotland, that peerages without patent, did in fact descend to a distant heir male, where a nearer heir female existed. As it appears that female heirs were never entitled to such dignities, but upon a resignation, and a new express grant thereof by the sovereign, which was the only method of defeating the legal succession of the heir male, in this case, there arises the strongest presumption in favour of such heir, from the continued succession in favour of heir male, and no grant appearing in favour of an heir female.

*Pleaded for the Earl of Ruglen and March.*—That the state of the investiture, at the time when the creation of the earldom took place, must be looked to. That at this time, it was conceived in favour of heirs general. That in 1671 a charter of resignation was granted by the crown to "the Earl of Cassils, and the heirs male of his body, whom failing, to the *heirs female* of his body, giving the estates "*cum armis et dignitate familiae de Cassils.*" Which charter was ratified in Parliament in 1672. This charter opened the dignity and honours to the female line. John, Earl of Cas-

sils, had issue a son, Lord John Kennedy, who died in his father's life, leaving issue a son, John, the last Earl of Cassils; and a daughter, Lady Anne, married to John, Earl of March and Ruglen, by whom she had issue a son and daughters.

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By the last Earl of Cassils' death in 1759, the Earl of Ruglen and March became entitled to the honours and dignities, as descended from the eldest daughter of John, the seventh Earl of Cassils, to whom the honours were limited. The Earl of Ruglen's claim, therefore, is founded, in the first place, upon the charter 1671; for if that charter operated as a new grant from the crown of the title and dignity of Earl of Cassils, with the ancient precedence, there was no room for any question as to the Earl of Ruglen's right to be preferred. But even if this charter should be held, not to operate as a grant of the title of honour, then the Earl of Ruglen and March claims the titles as descended upon him the lineal heir, by the law of descent, because it clearly appears from Stair (B. 3. T. 5. § 12), and Sir Geo. M'Kenzie, (B. 3. T. 9. § 25), that heirs portioners are *heirs of line*; and it is beyond all question, that heirs females have been in the practice of succeeding to peerages.

Further, by the ancient usage of Scotland, the dignities of Earldom and Lordships were territorial, and the title was annexed to the land. In course of time they became personal, and inherent in the blood of the person ennobled; and there were two ways in which the dignity was conferred;—the one, by charter granting lands erected into an earldom or lordship, with the dignity of earl or lord to the grantee, with such limitations of heirs as the king pleased. The other was by a solemnity of creation, performed in full parliament, *per cincturam gladii*, and other ceremonies. This being the case, it clearly appears that this dignity of Cassils was originally created without any patent, or grant, expressing or containing any limitations whatever, of its descent. The creation gave an estate of inheritance in the honour, which is descendible according to the ordinary course by which every other right of inheritance descends, and, therefore, will descend to daughters and their issue, and to the claimant, as the issue of one of these daughters.

After hearing counsel upon the report from the Lords' Committee of Privileges, appointed to consider of the petition of William Earl of March and Ruglen, claiming the titles and honours of the Earl of Cassils and Lord Kennedy;

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E. OF RUGLEN. and also the petition of Sir Thomas Kennedy, Bart., claiming the said titles and honours, with his Majesty's reference thereof to this House.

It is resolved and adjudged, that Sir Thomas Kennedy has a right and title to the honour and dignity of Earl of Cassils, as heir male of the body of David, the first Earl of Cassils, and that he also has a right and title to the honour and dignity of Lord Kennedy, as heir male of the body of Gilbert the first Lord Kennedy.

For Sir Thomas Kennedy, *C. Yorke, Ch. Hamilton Gordon*

For Earl of Ruglen, *Al. Forrester, Al. Wedderburn.*

*Note.*—The following letter was written by Lord Mansfield, in regard to this case, and found inside the appeal case of Lord Hardwicke, along with his notes of the grounds of his decision.

“ Friday Morning, 18th December 1761.

“ My Dear Lord,—I am very sorry your cold is worse. You are much in the right not to come out. In talking to my Lord Chancellor and me last night, Lord Marchmont seemed very strong for supporting the charter 1671. What he said has set me a thinking again upon that point ; and, upon looking into a very full brief of instructions, which I read in the case of Stair, drawn by the Scotch lawyers, particularly Lockhart ; and a volume of charters thought applicable to the points then in question, several things occur worth consideration—I won't trouble your Lordship with them at present—I will only say, in general.

“ That all resignations of honours seem to be in the hands of the Commissioners of Exchequer and Treasurer, as this is. *That* of Stair is so.

“ The form of grants of territorial honours, is to erect the lands into an earldom ; and to grant it *cum pertinentibus*, &c. The form after the reformation, was to erect church lands into an earldom, barony, &c.

“ An Act of Parliament in 1592, gave rise to the express erection of them to be Lords in Parliament, that the grant of the lands might be good.

“ In numberless instances, the limitations of the honour are to follow the limitations of the land, which introduced the absurd clauses of assigning, appointment, revocation, &c.

“ The only use of the King's signature for the charter 1671 seems to be pressed in regard to the honours. As to every thing else, it would have been valid without it.

“ If the construction of the charter be to grant the earldom with the dignity of an earl, Lord Marchmont mentioned to us several answers to the objections, arising from the recital of the resignation, worth

considering. Both points, therefore, are of difficulty, and the consequence too great to be determined without your Lordship, but I would be very loth to give your Lordship the uneasiness of putting the parties to expense, much less to lay you under any temptation to come out too soon, or to look into very disagreeable lumber, when you are not well.

"What I would propose, therefore, is to hear the counsel to day, (probably nothing new will be said, if there should, your Lordship may be apprized of it), and then to adjourn judgment until after the recess, the first Committee day. I believe my Lord Chancellor has not much attended to it, and if I am to open the opinion, I am not clear upon either point to be able to do it so soon as Monday next. In truth, I am very unwilling to fix my own judgment without first communicating with your Lordship, and knowing your sentiments. I am,

"MANSFIELD."

Adjourned accordingly.

*Lord Hardwicke's Note.*

"After time taken for consideration, on debate, but without any division, the Lords resolved, That Sir Thomas Kennedy, as heir male, was entitled to the titles and honours of Lord Kennedy and Earl of Cassils ; and so reported it to the King.

"The grounds were two :—

"1st, That no particular limitation or constitution of the fief appearing, it ought to be presumed to be a male fief; that being the most usual and customary limitation in those ancient times, especially in the case of an earldom, which was originally an office.

"2d, That the resignations and new charters of 1642 and 1671 did not comprise or extend to the dignities and honours of the estate."—

"Lord Marchmont differed."\*

Unreported in Court of Session.

[M. 14070.]

JOHN GORDON of Auchanachy, and ALEXANDER GORDON, his Trustee,	- - -	{ <i>Appellants</i> ;
Miss GRIZEL OGILVIE,	- - -	

House of Lords, 22d March 1762.

REDUCTION—TRANSACTION—*RES JUDICATA*—REPRESENTATION—

PREScription.—Circumstances in which transaction with predecessor, was held to bar the challenge of the heir, though the deed of renunciation embodying this transaction was also sought to be reduced; and the heir insisted that he was not bound by his mother's

\* In Lord Hardwicke's handwriting.

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deed, he not representing her, but passing by and claiming right from a more remote predecessor. Also, that *res judicata* barred action; but plea of prescription repelled, in respect of interruption.

Robert Middleton of Balbegno, was married to Anne Ogilvy, who was sister to the respondent's father; and by articles entered into on his marriage, he provided and declared, that the tocher given to the wife by her father, should return to her own relations, in the event of there being no issue of the marriage. He at same time took out charter of these lands of Balbegno, conceived in favour of himself and Anne his wife, and the survivor of them, in joint fee and liferent, and to the heirs of his body, of that or any other marriage, whom failing, to his own nearest heirs and assigns.

An heritable bond was thereafter granted over the estate, for the tocher, bearing the conditions on which it was given, and the return of the same to the wife's relatives, in the event of there being no issue of the marriage.

Thereafter, in the year 1710, Robert Middleton executed a gratuitous disposition of the said estate of Balbegno, in favour of John Ogilvie, his wife's brother, redeemable by the said Robert Middleton, for a rose noble at pleasure, and also redeemable by any heir male or female of his body, upon such heir attaining the age of twenty-one years complete.

Both parties having died without leaving issue of the marriage, the estate of Balbegno, in terms of the last deed, was taken up by John Ogilvie, who was infest, and possessed for a considerable number of years without challenge.

Elizabeth Middleton or Gordon, was sister and heir of line to her brother Robert Middleton, and the mother of the appellant John Gordon, and the party entitled to succeed to the estate, but for the above deed.

Sometime before her death, she had raised adjudication against the estate, on bonds due to her two deceased brothers, who were creditors of Robert Middleton, and to which bonds she had succeeded by their decease; she had also threatened to raise a reduction of the disposition, in favour of May 26, 1713. John Ogilvie, when these matters were arranged, by a transaction and agreement, by which Mrs. Elizabeth Middleton or Gordon and her husband, agreed to accept of £377 in full, and became bound, "that neither she, the said Elizabeth Middleton, nor any of the children procreate or to be procreate between her and the said Charles Gordon,

"their descendants, shall quarrel the said Mr. John Ogilvie,  
"nor his heirs and successors, their right, title, and posses-  
"sion of the said lands of Balbegno," &c.

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Instead of abiding by this agreement, as to the lands of Balbegno, she thereafter revoked the same, by a deed of revocation, setting forth, that the same was impetrated from her, without any judicial ratification on the part of her husband; she also executed a trust bond to the appellant, who thereupon led an adjudication of the estate of Balbegno, and she also brought an action of reduction of the disposition to Ogilvie. Defences were lodged; and decree of absolvitor was pronounced therein.

After her death, the present action of reduction was brought by the appellant her son, against the respondent, the representative of John Ogilvie, on the ground, that at the time the marriage contract was entered into, and also at the time the heritable bond was granted, and also at the time the disposition above referred to was executed in 1710, the said Robert Middleton was of a facile and weak mind, and, therefore, that the deed ought to be set aside, as granted to the fraud and lesion of the pursuers, being the heirs to whom the estate ought to have descended. In defence, it was stated,

1. That at the time of Robert Middleton's death, the estate was incumbered with debt, to the extent of 20 years' purchase, and therefore no fraud in the conveyance. 2. That the taking of an heritable bond upon the estate, bearing the tocher returnable to the wife's relations, in the event of no issue, was a usual stipulation in marriage contracts. 3. That the deceased was of sound disposing mind. 4. That the defender and her ancestors have been in peaceful possession under infestment, for the period of the positive prescription. And, 5. That the pursuers were barred from challenging those rights, by a transaction entered into with the said Elizabeth Middleton or Gordon, whereby she, for an onerous consideration, discharged all right and claim she had on the estate, which transaction was supported by *res judicata*, by a decree of absolvitor, obtained in an action raised by her for the same claim, after defences being stated to the same. The answer made was, that prescription did not apply, and that as he did not represent his father or mother, but took up the estate as in *haereditate jacente* of Robert Middleton, he was not bound by the acts and deeds of his mother.

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On report of the Lord Ordinary, the Court found "that the defenders and their father, John Ogilvie, have been in possession of the lands and estate of Balbegno, by virtue of a charter and sasine, upwards of 40 years, but rejected the defence of prescription, in respect of the interruption thereof, by the process of reduction raised by Alexander Gordon, on the trust bond granted to him by Elizabeth Middleton in the year 1756: But sustain the defence of *res judicata*, proponed by the defenders, in respect of the decree of absolvitor pronounced in the said process of reduction and improbation in their favour. And also sustain the defences that the pursuer, John Gordon, represents his father, Charles Gordon, and is thereby barred from challenging the deed of renunciation, of all claim on the estate of Balbegno, and therefore the defenders have produced sufficient to exclude the pursuer's title, and asoilzie and decerns."

On reclaiming petition, the Court thereafter pronounced Feb. 9, 1761. this interlocutor:—"Having advised this petition, with the answers, and heard parties' procurators upon the point mentioned in the former interlocutor, sustain the defence founded on the transaction with Elizabeth Middleton in the year 1713; and of absolvitor pronounced thereon in favour of the defender in the year 1753; and adhered to the points in the former interlocutor reclaimed against."

Against these interlocutors the present appeal was brought to the House of Lords, in so far as these interlocutors sustained the defence of *res judicata*, founded on the decree of absolvitor; and the defence that the appellant, John Gordon, represents his father Charles Gordon, and is thereby, as well as by the transaction referred to, barred from challenging the deed of renunciation of the estate of Balbegno, executed by Mrs. Elizabeth Middleton or Gordon, his mother.

*Pleaded for the Appellants* :—Elizabeth Gordon died without having made up a proper title to the estate of Balbegno. The adjudication led upon her trust bond was no more than a title to bring a process for trying her right to the estate. It was never conveyed to her by her trustee, but her action being cast upon an objection, personal to herself, the adjudication fell to the ground, and never became a title in Elizabeth to the lands. Such a title without possession is not sufficient to fix a representation upon the apparent heir, nor to divest the predecessor, and therefore the next heir may pass over without representing, which the appellant in

this case having done, is not bound by the deeds of his mother. As her adjudication was abortive, the fee of the estate remained in *hereditate jacente* of Robert, her brother, last infest. The appellant, therefore, does in no shape represent his mother, Elizabeth Middleton; and this being the case by the law of Scotland, no deed of the ancestor can affect an heir who has not made up titles to him—at least Elizabeth Middleton's adjudication can be no title to this estate further than to the amount of £7000, the sum in the trust bond, but quoad the surplus, the *res judicata* against Elizabeth can not strike against the appellant. There being no sufficient title, there could be no prescription, and no proof adduced of uninterrupted possession. The appellant further never represented his father, nor ever took any benefit from his father's inheritance, and ought, therefore, to be entitled to set aside the deeds which affect his rights to the estate of Balbegno.

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*Pleaded for the Respondent:*—The transaction entered into with Charles Gordon and his wife Elizabeth Middleton, the appellant's father and mother, in 1713, and the decree absolving the respondent from Elizabeth, his mother's suit, whereby the matter became *res judicata*, are sufficient bars to the present reduction, and the defence, on these grounds, ought to be sustained, and the action of reduction dismissed. It is no answer to him to say, that he, as heir, ought not to be excluded from challenging a transaction which deprives him of his rights, he having been no party to the transaction, because, as he claims upon the same right, and the very same grounds, as his mother, and as deriving that right from her, it must descend from her to him, with all the exceptions pleadable against it, and affectable by her obligations. And the mere fact that he claims and sues for a right descendable to him, from her or his father, is a sufficient representation to subject him in the passive title, so far as he claims the right sued for. Besides, the appellant was further barred, by the positive prescription, because there had been continued possession of the estate by the respondent's father and his heirs upon charter and sasine, for more than 40 years, before this action was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For Appellants, *Tho. Miller, Al. Forrester.*

For Respondents, *C. Yorke, Ja. Montgomery.*

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*Note.*—Lord Kames says, Dec. p. 239, “This process was spun out to a great length by a multitude of points and circumstances which deserve not to be recorded. The cause, purified of its dross, resolved at last into the following point:—What should be the effect of Elizabeth's ratification? It is effectual to exclude Elizabeth herself; but is it also effectual to exclude Andrew's other heirs insisting in a reduction of the settlement after Elizabeth's death, though they do not represent her? It occurred at advising that if the reduction had been brought before Ogilvie was infest, the pursuer could have no title without being served heir in special to the land remaining still *in hæreditate jacente* of Robert. But that Ogilvie's infest-ment which *funditus* denuded Robert of the property made the case very different. The ratification (renunciation) was accordingly sus-tained as a bar to the action.”

[M. 15,196, Fac. Col. ii. p. 256.]

Captain JAMES FRAZER of Belladrum, - *Appellant*;  
 His MAJESTY'S ADVOCATE, - - - *Respondent*.

House of Lords, 30th March 1762.

**LEASE—DURATION—POWERS.**—A lease was granted for 1140 years for a valuable consideration given, besides a yearly tack-duty. Sasine and possession followed: Held, on the forfeiture of the estate, that the lease was good against the grantor, and also against the crown, reversing the judgment of the Court of Session.

June 8, 1770. Of this date, *Hugh Lord Lovat* granted a lease of the lands of Fingask to Simon Frazer for the period of twenty times nineteen years, or 1140 years, in which he was duly infest. This lease was afterwards acquired by and assigned to the appellant.

Simon Lord Lovat succeeded to the title and estates of Lovat; and in 1747 was attainted for high treason, and his estates forfeited to the crown.

The appellant then, in right of the lease, made a claim against the crown, to be allowed the possession under the lease, on payment of the stipulated rent. But his Majesty's Advocate objected to the lease, on the ground, 1st, That a lease of lands, for so long a term as 1140 years, was an anomalous right, unknown in the law of Scotland, and therefore invalid; 2d, Besides, even supposing it good, Hugh Lord

Lovat had no power to make an effectual lease in 1670, because he was divested of the lands at that time, he having in 1665, conveyed the fee to his daughter; 3d, That supposing the lease good against the grantor and his heirs, yet it did not follow that it could be binding on the late Lord Lovat (the forfeiting Lord), because he acquired the estate not by descent, but by singular title. He had acquired the estate by apprisings and adjudications led for debt. Answer, 1st, That the lease was a fair purchase, obtained without fraud, and for a valuable consideration besides an adequate rent and tack-duty; and possession had followed upon it from its date to the present time; and therefore, supposing it originally defective, it was now placed beyond all question by the positive prescription; and every ground of challenge barred by the negative prescription. That there was no law or usage limiting leases to any certain number of years. That here infestment and possession had followed; and this made it good not only against the grantor and his heirs, but also against purchasers or singular successors; 2d, That although the base fee at the date of the lease, was conveyed by the grantor to his daughter, yet in him there still remained the *dominium directum*; and that base, or subaltern infestment, was afterwards evacuated by the subsequent existence of a son, who was entitled to redeem the estate from the daughter; 3d, That the late Lord Lovat, no doubt, had entered into possession upon an apprising, but he was no less liable, as representing his father the lessor, and as taking from him.

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Of this date, the Court found the tack not good against Jan. 14, 1758. " Simon, late Lord Lovat, the forfeiting person, nor is now " against the crown, as coming in his place, and therefore " dismisses the claim."

On reclaiming petition, the Court adhered in so far as it Feb. 3, 1759. reclaims against two interlocutors, finding the tack not good against the Crown. But remitted to hear how far it is competent to sustain the tack for 19 years. Memorials were given in on this point; but the Crown having appeared and consented to the tacking being sustained for 19 years, the Dec. 6, 1759. Court declared accordingly.

Against these interlocutors the present appeal was brought. After hearing counsel, it was

Ordered and adjudged, that so much of the said interlocutor of the 14th of January 1758, as finds the tack in question was not good against Simon late lord Lovat

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the forfeiting person, nor is now against the crown as coming in his place, and dismisses the claim; as also the said interlocutors of the 22d of December 1758, and the 3d February and 6th of December 1759, complained of be, and the same are hereby reversed, and that the said appellant's claim be sustained.

For Appellant, *Alex. Lockhart, Wm. Johnstone.*  
For Respondent, *C. Yorke, Thomas Miller.*

CHARLES CAJETAN COUNT LESLIE, LEOPOLDUS COUNT LESLIE, Eldest Son, ANTHONY LES- LIE, Second Son, and CHARLES COUNT LES- LIE, Third Son, of the said COUNT CHARLES CAJETAN LESLIE - - - -	Appellants ;
PETER LESLIE GRANT, and his CURATOR, Ad) Litem - - - -	

*Respondents.*

House of Lords, 2d February 1763.

**ALIEN—PROOF.**—A person, a natural born subject of England, had issue born abroad before the 7 Anne (Naturalization act), out of the liegeance of the King. This son had issue, Count Anthony Leslie, also born out of the liegeance of the King; Question of law submitted to the whole judges of England: Whether Anthony was capable of inheriting land estates in Scotland? Held unanimously, on full consideration of the statutes, that Anthony Count Leslie, was to be deemed an alien, and not capable to inherit such estate—That the statutes extended only to the children of a natural born subject of the first degree, and not to the grandchildren, and Anthony's father not being a natural born subject of England, but an alien born abroad, before the passing of the 7 Anne, he could take no benefit.—Proof rejected in consequence of diet not being regularly intimated in terms of commission issued.

FOR the circumstances of this case, vide Craigie and Stewart's Reports, p. 324. It arose out of a settlement of the estate of Balquhain by entail, with conditions, that should the first heir of entail also succeed to estates in Germany, then in that event, the estate of Balquhain was to devolve on the next heirs therein specially called—the object being that the two estates should be kept separate, and enjoyed

by different branches of the family; and, in particular, that Balquhain should be enjoyed only by protestant members of the family, excluding papist branches.

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In the Court of Session, it was found, that Count Charles GRANT, &c. Cajetan Leslie having succeeded to both estates, must de- Feb. 11, 1741. nude his right to Balquhain in favour of the next heir of entail, who was James Leslie of Pitcaple, and that as Count Leopoldus and Antonius Leslie were only called in their order, as heirs male of Balquhain, in the event that had happened, therefore, the estate was not to be denuded in their favour:—But on appeal to the House of Lords, this judgment was reversed; and it was found and declared, that An- April 29, 1742. tonius Count Leslie, was the next heir of tailzie entitled to succeed.

The question then came to be, whether Antonius, being the grandson of a natural born subject (Earneſt) and the son of Count Cajetan Leslie, (who was born in Germany, before 7 Anne, out of the liegeance of the King,) was to be deemed an alien, he being the subject of a foreign state, born in Germany, and a papist?

A proof was allowed and taken in foreign parts: Whether Charles Cajetan Count Leslie the father, and Antonius Count Leslie, his second son, on whom the estate of Balquhain devolved, (the eldest son taking the estate in Germany), were born without his Majesty's allegiance and papists? After report of the proof was taken, and debate on the objections thereto, and on the merits of the whole cause, the Lords of Session, of this date, pronounced this interlocutor; Dec. 4, 1761.

" Repel the objection that the pursuer has not made the  
 " Crown a party in the process; and also repel the objection  
 " of the two sons alleged by the defenders, to be procreate  
 " of the body of Count Leopoldus not being called, in re-  
 " spect this objection was proponed among other dilatory  
 " defences, and repelled by the interlocutor of the Court,  
 " dated 29th July 1757, which, upon appeal, was affirmed by  
 " a decree of the House of Lords the 6th April 1758, sustain  
 " the objection to the proof taken at Venice; but find it  
 " proven by the testimonies of witnesses and other legal evi-  
 " dence adduced in this cause, that John Grant of Ballin-  
 " dallock, defender, is past the age of 15 years and a pro-  
 " fessed papist, and found it proven that Charles Cajetan  
 " Count Leslie, and his three sons, Counts Leopoldus, An-  
 " tonius, and Charles, defenders, were all and each of them  
 " born abroad, and in foreign parts, out of the liegeance of

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" the Crown of Great Britain, whereby the said Counts  
 " Leopoldus, Antonius, and Charles, being aliens, have no  
 " inheritable blood, and cannot succeed to heritage in Scot-  
 " land; and therefore find and declare the retour of the  
 " service of Antonius Count Leslie as heir of tailzie and pro-  
 " vision to the deceased Earnest Leslie of Balquhain, dated  
 " 2d August 1742 years, with the decree of adjudication in  
 " implement, at the instance of the said Antonius Count  
 " Leslie, against the said Charles Cajetan Count Leslie, his  
 " father, void and null."

It was then objected, that as no proof had been brought  
 of the non-existence, failure, or disability of Count Leopold  
 Leslie's two sons, no judgment could be pronounced in their  
 Jan. 13, 1762. favour; but the Court " found it proven by acknowledgment  
 " that the said Leopoldus Count Leslie had at present no  
 " issue."

Proof was next allowed of the death of James Leslie of  
 Feb. 5, 1762. Pitciple, whereupon the Lords pronounced this interlocutor:  
 " find it proven that James Leslie of Pitciple died upon the  
 " 12th day of March 1757 without issue, and therefore in  
 " consequence of the former interlocutor, dated the 13th  
 " January last, finding it proven, that Leopoldus Count Les-  
 " lie has at present no children, and the other former inter-  
 " locutors, dated the 4th December last, find and declare,  
 " that the petitioner, Peter Leslie Grant (respondent and  
 " son to John Grant, next substituted in the entail) is now  
 " the nearest protestant heir of tailzie, entitled to succeed  
 " to the estate of Balquhain, and further, find and declare  
 " that Charles Cajetan Count Leslie, is obliged to make up  
 " titles and denude himself of the said estate of Balquhain  
 " in favour of the said Peter Leslie Grant, that the same is  
 " redeemable by him, from the said Charles Cajetan Count  
 " Leslie, and his eldest son, and his heirs male, for payment  
 " of the sum of ten merks Scots money; and repel the whole  
 " other defences, and decern and declare accordingly." On  
 reclaiming petition the court adhered.

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Against these interlocutors the present appeal was brought  
 to the House of Lords; and a cross appeal by the respon-  
 dent, against that part of the interlocutor which sustained  
 the objections to the proof taken at Venice.

*Pleaded for the Appellant.*—The respondents ought to  
 have brought clear and positive proof of the fact averred by  
 them, that the appellants were born in foreign parts, and are  
 aliens and papists, and not relied, as they have done, on

vague hearsay and report. The fact was of recent date, and ought to have been proved with more certainty from the high rank of the appellant, whose place of birth, the respondents make to be Gratz in Stiria, and the government of that province to have been long in their family. But, instead of plain direct proof, they have only produced two or three German witnesses, of low stations, and very improper to testify in the matter. These witnesses, as was natural to expect, speak to nothing of their own knowledge, but at second or third hand. Nor are the Scots witnesses worthy of greater attention, as they never saw the appellants, nor corresponded with them, and had, therefore, no better means of knowing the fact in question, than the Germans had by hearsay. The two letters produced by Isabel Leslie, are not proved to be of Count Charles Cajetan's handwriting, and, therefore, were not evidence; nay, on comparing them with other writings, admitted to be of Count Charles Cajetan's hand, they are totally unlike. On the law of the case, and assuming the proof to be unexceptionable, it appeared, from the writers of the Scots law, and from judicial determinations, that alienage did not disable a man from inheriting and holding lands in Scotland.

Naturalization indeed, whether by King or Parliament, was necessary for conferring the *jus civitatis*, or enabling the alien to hold offices or dignities; and when granted, was always in the most comprehensive words, including the privileges the alien enjoyed, without as well as by it; *that*, for example, of acquiring moveables or personal estates, which it was never doubted but an unnaturalized alien might do. But, admitting that aliens were incapable of inheriting, the son of a natural born subject born abroad, was not so incapable; for he was, by the law of Scotland, a natural born subject; and there is no trace on record, of such being ever passed by, in the descent, as an alien, and the estates going to the crown, or to a remoter heir.—Count Charles Cajetan, though born abroad, was the son of a Scotsman, and, therefore, a natural born Scotsman; and by the union, became a natural born subject of Great Britain, to all intents and purposes whatever, as afterwards declared, by the 7 Anne and 4 Geo. II. This being the case, the appellant Count Anthony, be he born wherever the respondents please, must, as the son of a natural born subject, be one himself, and not an alien; which is the legitimate construction to be put upon the act. Further, both the appellant and respondent claim as special

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substitutes, and the benefit of alienage, always redounding to the crown even in case of descent, it is impossible that the respondent Grant, can have any title or benefit from Count Anthony's alienage, whose right continues good, until set aside at the instance of the king.

*Pleaded for the Respondents*—As among the ancient states, particularly the Grecian and Roman, no alien could hold lands, so by the practice of most civilized countries in Europe at present, particularly England, Scotland, and France, no alien can hold lands in any of these countries, and that agreeably to the maxims of the Roman and feudal laws. That such is the law of England and France, is not, nor can be disputed; that such was the law of Scotland, antecedent to the union with England, is plain from a variety of authorities cited to the court; whereby it appeared that the king naturalized foreigners, in order to entitle them to hold land estates; and by many acts of Parliament to the same purpose, particularly, *that* in the year 1707, upon the intended union of the two kingdoms; the consequence whereof is, upon the supposal, that the several descendants of Count Charles Cajetan Leslie are aliens, that the estate of Balquhain, which would have devolved upon Count Anthony, had he been capable of inheriting, falls to the respondent, as called next to the succession.

From the proof brought before the Court in this cause, independent of that part which has been rejected; it is manifest, that Count Cajetan and all his children have been born in foreign parts; and the necessary consequence whereof is, that at least his children are aliens, however he himself may claim the privilege of a natural born subject, under the acts 7 Queen Anne, and of King Geo. II.—But this personal privilege, supposing it ever so well founded, Count Charles Cajetan cannot avail himself of; because by the settlement of the estate of Balquhain, he stands bound to denude in consequence of the succession to the German estate opening to him. And this privilege, which the father was entitled to plead, as a natural born subject, born abroad, is confined to him alone, and does not entitle his issue to the same benefit. In regard to the cross appeal brought by the respondent,—it was wrong, after the House of Lords had determined that the proof taken at Venice should be received virtually, to disregard it, as after that judgment, ordering it to form a part of the process, it ought to have had its due weight, and not been totally rejected. But even supposing that the ob-

jection made to the proof taken at Venice were good, and the certificates relative thereto, shewing, that notice of the diets was put into the post-office *there*, and had come to Edinburgh, instead of remaining *there*, were objectionable, still the proof otherwise adduced, independently of this part of the evidence, being conclusive, the proof taken at Venice ought to have been received to the effect of supporting that evidence.\*

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\* Note.—The argument of counsel, as noted by Lord Hardwicke, acting for the Lord Chancellor (Northington), appearing different from the above, taken from the printed appeal, it is given below.

*Lord Advocate of Scotland for appellants.*—Four points of view:—

1. As to the statute 7 Anne, cap. 5.
2. As to the statute 4 Geo. II. cap. 21.
3. As to the act 25 Geo. II. for naturalizing foreign Protestants.
4. As to the common law.

By the common law of Scotland, the son of a natural born subject of Scotland born abroad was deemed in law a natural born subject.

So it was by the common law of England, according to the statute of 25 Edward III. stat. 2.

*Mr. Forrester ad idem.*

42 Edw. III. c. 3.

*Hyde and Hill, Cro. Reports Eliz. p. 3.*

If husband and wife go abroad without license; or if with license, and they stay beyond the time of the license, the children born abroad after *that* are aliens.

*Croke's Reports, Car. 601.*

*Littleton, 23.*—The same case stated, though merchant married a Posh woman.

How they regard the words of the statute 25 Edw. III., which required both father and mother to be at the faith and liegeance of the king.

Many factories established abroad, where families have resided for many generations.

It is said the statute *De natis ultra mare* had been restrained by construction.

The genius of the present times tends to enlarging and not to contracting of these cases.

*Mr. Attorney-General for respondent.*

Two questions.

1. Whether by the common law of Scotland Count Anthony is excluded from the succession?

2. Supposing he is excluded by the common law, Whether he is aided by any statute made in England or Great Britain? This leads to a third question.

3. Supposing he is not a natural born subject himself, Whether he is so by being the son of a natural born subject?

*The point they put it upon is the latter, That Count Anthony is capable as the son of a natural born subject.*

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After hearing counsel, the following question of law was put to the whole judges in England.

Earnest, a natural born subject of England, had issue, Charles Cajetan, now alive, born before the seventh year of

As to the passage cited out of Sir Thomas Craig, "Si parentes sint ad fidem domini regis."

That means going abroad in the service of the king, or with license.

2d Point. Whether Count Anthony is made capable by any statute whatsoever.

Objection two ways.

1. By the treaty of Union, in consequence of the statute De natis ultramare.

2. By the conception of the statute 7 Anne.

As to the first, I should presume it a doubtful case if the statute occasioned the statute 7 Anne.

That statute, 25 Edw. III., is declaratory as to the children of the crown ; as to common subjects it is enacting.

In the first, the expression children of the crown includes all issue. In the other as to subjects, not so.

The second part gives power to the king to naturalize certain parties by name. These cases refer to sons.

It appears by the cases on this statute that there never was a statute of so doubtful a construction.

Lord Coke takes no notice of it in Coke-Littleton, p. 8.

Littl. Reports, 28, King, &c.

Sir Robert Sawyer's arguments in the case of Sandys, and the East India case, 7th vol. of the State Trials.

A subject at going abroad without license *animo remanendi* is not *ad fidem regis*.

As to the statute 7 Anne. That act, according to the opinion of Lord Hailes, restrains naturalization within the father as a natural born subject.

Coke on Littleton, 29.

Natural born subjects are mentioned in the acts of Parliament to be a subject born in England. Neither Count Anthony's father nor himself was born in England.

The children of natural born subjects have a privilege, but this must be the immediate issue, not issue in general.

Statute 4 Geo. II. The act places the word children in the precise sense of immediate children, in all the cases exemplified by the words of the act. Reads the act.

The first part of the statute 7 Anne relates to the naturalization of foreign Protestants, and the clause in question ought to be construed consistently with that intent.

Mr. Wedderburn *ad idem*.

The appellant, Anthony, cannot bring himself within the statute 25 Edw. III., because his father was not at the faith and liegeance of the king.

But his grandfather was, because he was born in Scotland.

the reign of Queen Anne, out of the liegeance of the king, who has issue, Anthony, born out of this liegeance of the king.

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**Question.**—Whether Anthony is capable to inherit, or take land for his own benefit, or ought to be deemed an alien?

The Lord Chief Justice Pratt, delivered the unanimous opinion of the judges present, upon the said question, as follows:—

\* “ In this case, all the judges are of opinion, that Count Anthony is to be deemed an alien, and not capable of inheriting, or taking lands for his own benefit.”

“ Count Anthony was son of Count Charles Cajetan, who is admitted to have been born out of the kingdom, before the statute 7

Whatever persons are born abroad of fathers, who go abroad for lawful purposes *animo remanendi*, it is very reasonable to naturalize them.

But nothing more useless and improper than to allow those to be naturalized, who, as far as they are able, have proffered their allegiance to, and are absolutely settled in a foreign country.

If you go beyond children there is no staying. They admit they cannot do so without resting upon a fiction.

The words are almost as strong as if there had been an express clause.

To reach the appellants' construction of the statute, you must change *children* into *posterity*, *fathers* into *ancestors*.

A construction which would be casting to the winds the entire act of settlement.

Upon the act *De Natis ultra mare*, Count Anthony could not have pleaded that his father was living at the faith and liegeance of the king.

Is Count Anthony a subject of Great Britain?

Suppose Count Anthony had come over in arms against the king? He would have been considered as a prisoner of war.

Suppose he was an officer in the employ of the army, would he be guilty of felony for going into a foreign service without the king's license?

But independently, the 7 Anne has no retrospect; and therefore cannot benefit Count Anthony, whose father was born abroad before the passing of that act.

*Mr. Forrester (Rp<sup>1</sup>.)*

The respondents have, in every instance, considered the children of an Englishman born abroad as aliens by the common law. I say they were denizens.

If you construe the act 7 Anne to extend only to the children of persons who were actually born within the king's dominions, you will exclude the children of ambassadors and merchants, who go abroad for trade, or in military service.

It will be for your Lordships' judgment to draw the line.

\* From notes taken by Lord Hardwicke.

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Anne; and nothing shewn to prove that his father lived in the faith and liegeance of the king of England at that time."

" Three points of view present themselves :—"

" 1st, Consideration of the case, as it stood before the act of 7th Anne.

2d, How it stands by a construction of the act.

3d, The inconveniences of that construction, or otherwise."

" 1st, It is impossible to state with precision, how the common law stood as to alienage, before the statute 25 Edw. III. (stat. 2), *De natis ultra mare.*"

" It looks as if that was the construction which brings from out of the liegeance of the realm, and not out of the faith and liegeance of the king. By the law of England these two cases are distinct."

" I looked into Cotton's records, to see what passed in 17 Edw. III. as to the question, whether it was started before."

" They held the case of the king's children, to be clear, (*i. e.* that the children of whatever degree enjoyed the privilege); and that the inference of the children of subjects born abroad, was very doubtful; and therefore it was undetermined.

" 42 Edw. III. The question was asked, what would be the rights of children born at Calais, Gascoigne, &c.; and whether they would be held as born within the dominions of the king, or beyond the liegeance,—the king of England then assuming the title of King of Great Britain, France and Ireland? The answer is, that the common law took place as to the one, and the statute 25 Edw. III. as to the other."

" The saying of Hussy in Richard III.'s time is incorrect; and this sanctioned by reference to the statute, 25 Edw. III."

" The doubt of the law was, whether any person ends his connection, and ceases to live at the faith and liegeance of the king, who chiefly resides elsewhere, and bound so to do. As for example; Ambassadors—persons going abroad with license—Merchants going abroad for merchandize, clearly so; but as to those persons going abroad without license, is a point not determined."

" At common law, any person not prohibited, might go abroad with license. This appears by reference to the statute, 5 Richard II. Cap. 2, prohibiting the exportation of gold and silver out of the realm, and also all persons to depart out of the realm without license. And yet if a person went to reside, remained, and settled *there*, it was not clear, whether his children were aliens or denizens, (Cro. El. 3. Hyde and Hill held Aliens). The statute 29 Charles II. related to the children of persons who went abroad in the time of the Usurpation. Should they go there by failure in health,—illness would go to presume the occasion of their going abroad. The statute 9 and 10 Wm. III., for acknowledging the children of officers and soldiers serving abroad in the king's service."

" This is strong case; and yet doubtful."

*"But all these related to children of natural born subjects in the first degree."*

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"Lord Coke, in Calvin's case, never takes notice of the grandchildren : and none of those statutes or cases, go further than the first degree. Now, this is precisely the peculiarity in reference to this case. Anthony is not the son of a natural born subject, but only the grandson of one.—his own father, Count Cajetan, having been born in Germany, before the naturalization act 7 Anne, and only himself the son of a natural born subject." LESLIES, &c.  
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"The notion that prevailed at the time of making the statute, 9 and 10 Wm. III. gained nothing to the statute 7 Anne, which was made during Queen Anne's war, and it is good law, not to carry reading beyond the words of the statute."

"None of the provisions in the statutory laws, therefore, extend to grandchildren."

"2d, As to the statute of Queen Anne. The first part naturalizes foreign protestants. The next clause describes or indicates who are in degree fit for naturalization. These are the parent and children, or the child to become so by petition upon the act."

"The statute explains the parent as not wanting naturalization."

"The common law right, and the statutory right, are set in opposition to one another."

"The appellant Count Cajetan admits, that the parent of all others must be a natural born subject, in fact and not by fiction. This strikes at his case."

"But he and his son have taken two ways to extend it, in order to make it serve their own purpose."

"1. By transposing the *father* into the place of the *child*.

"2. By transposing children into *posterity*."

"Count Charles Cajetan is made to be both child and father."

"If the Parliament had intended this to be the case, they would have expressed it more clearly in the act. The act quarto Anne, c. 4. (particularly the binding section), passed two years before, was considered to carry against naturalization to all such *posterity*."

"3d, Inconveniences that would arise from entering on a construction of the act. It would let in all sorts of persons into the family rights, Jews, French, &c., without any test or qualification—without any residence."

"The advocates for the full extent of the naturalization have not contended for it without some qualification."

"All the acts I have recited, require some qualification. Were this not the case, in terror, the might naturalize one-half of Europe."

"This would undermine the act of settlement ; for if natural born subjects, they are naturalized before a member of this family, then they will be capable of offices, and grants of the lands from the Crown within the explanatory act 1 Geo. I."

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Lord Hardwicke's observations on the argument—

“Two things in the statute of 25 Edw. 3, show it not to be declaratory of the common law.”

“1st, It is in future words—‘*that shall be born.*’

“2d, It requires both father and mother to be natural born subjects; whereas, if it had been the common law, the father's being a natural born subject, would have been sufficient.”

After hearing counsel, as well yesterday as to day, upon the other points in the cause; and due consideration had of what was offered on both sides, it was

Ordered and adjudged, that the interlocutors therein complained of be, and the same are hereby affirmed. And it is further ordered, that the Court of Session in Scotland, do give all proper directions, relating to the continuance or discharge of the factor or receiver of the rents and profits of the estate in question, appointed by order of the said Court; and for his accounting for, and paying over, the rents and profits of the said estate, as to the said Court shall seem just.

## Judges present—

Pratt, Chief Justice, C. P.

Clive, J. Adams, B.

Bathurst, J. Perrot, B.

Wilmot, J. Lord Mansfield.

Gould, J. Lord Hardwicke.

For Appellants, *Thomas Miller, Al. Forrester.*For Respondents, *C. Yorke, Ja. Montgomery, Al. Wedderburn.*

Unreported in Court of Session.

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ALEXANDER DUKE OF GORDON and his Curators, *Appellants;*  
 JAMES EARL OF MORAY and WILLIAM EARL OF } *Respondents.*  
 FIFE, - - - - }

House of Lords, 9th March 1763.

RIGHT OF FISHING.—A difference having arisen as to the import of the judgment of the House of Lords, fixing the boundary between two fishings, as being the line which the sea made upon the coast where it cut the river Spey: Circumstances in which the Court

of Session was held entitled to order certain permanent landmarks, indicating this line to be fixed up.

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THE river Spey falls into the upper part of a bay or haven, which the sea enters and fills at high water. The mouth or entrance of the bay, between two heads, is about 500 yards wide, from whence the sea expands in a circular form, containing a depth of water of 16 feet, capable of admitting ships of 100 tons.

The appellant's family possessed a right of salmon fishing in the water mouth of the river Spey, by virtue of a charter from the crown in 1676, bearing to give a fishing "introitu fluminis de Spey," which in a subsequent crown charter 1689, was expressed "in littore et ostio fluminis de Spey." While the respondents' claimed, in equal moieties, the right of salmon fishing *within* the river Spey, from the said haven and water mouth up the river for about three miles.

The respondents' fishing in the river Spey was divided into stations—the lower was called the Haven shot—the next the Rake, and the highest the Pott. The Potty and Linn Burns were situated *within* the haven mouth, about 350 yards from the sea. The appellant claimed the exclusive right of fishing from these burns downwards to the sea, and the respondents stated that their right of fishing included these burns, their titles conferring upon them a fishing in the "three shots of the said river called the Haven, " the Rake, and the Pott, as high up and low down, and on "any side of the water, as any of their predecessors had " used the same before."

Having thus got into dispute, mutual actions were brought in the Court of Session to ascertain their rights. A proof was adduced by the respondents that they and their predecessors had used to fish the Haven down to where the fresh water enters the sea at lowest ebb. And the judgment of the Court of Session being taken to the House of Lords by the Duke and Duchess of Gordon, that House fixed, by its judgment of this date, "That the (then) respondents have April 16, 1728.  
" the exclusive right of fishing in the channel of the water  
" Spey downward to the place where the line which the sea  
" makes upon the coast cuts the river at high water, and  
" that they had not right to fish below that line; and that  
" the then appellants had the exclusive right of fishing with  
" the tug net from and below the said line to the sea, and  
" that they had not right to fish above that line."

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1763. In resorting to the fishing after this judgment, still further

D. OF GORDON. disputes arose as to its import. The appellants insisted that it gave the Duke a right to fish *within the bay*, below the

&c.

v. line where the sea cuts the river Spey, which the respon-

E. OF MORAY, dents disputed, and raised the present action to have it &c.

found that the line described as the boundary of the two fishings, is the line formed by the appulse of the sea to the coast, *without the bay*, at high water, and which in that direction divides and cuts the river from the sea at high water.

June 27, 1761. The Lords "found that the line described in that judgment, where it crosses the river, being marked upon the plan or map made by authority of the said Court of Session, runs from the west head, letter A, to the east head, letter B, and appoint the two sheriffs to concur in fixing proper marks at the two extremities on the said line on each side of the said river; and prohibit and discharge said defenders from fishing with the tug net, above the foresaid line, or to molest, disturb, or impede the pursuers in their fishings upon the said river, above the foresaid line, and remit to the Lord Ordinary in the cause to proceed accordingly."

July 29, — Against this the appellants reclaimed, but the Court adhered.

The present appeal was then brought to the House of Lords.

*Pleaded for the Appellants:*—That it was clear from the appellants' titles—from the royal award—and from the decree of the House of Lords, that the respective rights of the parties in the salmon fishing was determined by *natural boundaries*, and it was therefore incompetent for the Court of Session, without the consent of the parties, to substitute for this natural boundary an imaginary line, to be determined and ascertained by artificial landmarks, liable to be destroyed and removed by the sea, by accident, or by design. The high water mark is the line fixed on by the House of Lords. At this time the bay is filled with sea, and the river and rivulets, which at low water run through the sands, are totally absorbed and annihilated, so that at that period of time, there is, in fact, no line formed by the sea upon the coast, which can with any propriety be said to cut the river, other than the circulating line formed by the sea *within the bay or haven*; and, as the land which surrounds this bay cannot be said to be the banks of the river, it is of necessity the coast or shore of the sea; and therefore the line

mentioned in the decree of the House of Lords, "which  
"the sea makes upon the coast at *high water*," is the line  
which the sea forms at high water on the land surrounding  
this bay. The two heads or forelands, which constitute the  
entrance to the bay or haven, and upon which the marks ap-  
pointed by the Court of Session to be set, are visibly nothing  
more than sand-banks, liable to daily variation from the  
operations of the sea and river. Such a line necessarily ex-  
tends the respondents' fishing not only *into*, but to the ut-  
most verge of the bay and haven, so as to exclude the  
appellant from fishing therein, and thus has deprived him  
of the most valuable part of his fishing.

*Pleaded for the Respondents:*—The line fixed by the  
House of Lords in 1728, was a line across the river Spey,  
which the sea makes upon the coast, as it flows in upon the  
land. That this line was the boundary of the two fishings;  
and in so far as the appellant's right was concerned, it meant  
the general line of outer coast next the sea, and not that  
line which goes round *within* the bay. That the Duke of  
Gordon's limits were the "Littora Maris." That the Ostium  
fluminis did not, and could not, comprehend the space from  
the Potty and Linn burns downwards to the sea, but only  
*that* without the bay; and, therefore, the Court of Session  
were warranted in ordering the fixed landmarks to be set  
up on the two headlands, at each side of the mouth or en-  
trance to the haven.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained  
of be affirmed.

For Appellants, *Thos. Miller, Al. Wedderburn.*

For Respondents, *C. Yorke, Al. Forrester.*

Unreported in Court of Session.

### M. 1592.

JAMES GROSETT, son and executor-dative of Walter Grossett of Logie, Esq., deceased, formerly Inspector-General of His Majes- ty's Customs in Scotland, - -	Appellant :
Sir JAMES MURRAY, Receiver-General of the Customs in Scotland, -	

House of Lords, 17th March 1763.

BILL—NEGOTIATION.—Held a party (a public officer) to whom a

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bill was indorsed in security of the customs, was bound, on the bill falling due, duly to negotiate it, and payment not being recovered in consequence of his neglect to do so : Held him liable in the contents.

THE Collectors of revenue and customs are required to render quarterly accounts to Exchequer, and, in making their remittances, they must state to what branches of the revenue the sum remitted is to be applied ; but when that cannot at the time be ascertained, or when a collector is removed from his office, the practice is, to remit cash or bills to the Receiver-general, to lie as a deposit until that be ascertained.

On the removal of Walter Grosett, who was Collector-general of Customs at Alloa, to a higher sphere of duty, a balance remained in his hands, due by him, to the amount of £205. 6s. ; and in payment of which he transmitted a bill, signed by James Drummond, merchant, as acceptor, Nov. 6, 1747. drawn in favour of himself, and indorsed to the Receiver-general, and payable at Candlemas then next, and bearing to be indorsed for value, being *his Majesty's money*. This bill was sent with the following note :—

“ Sir,—Enclosed I send you Mr. James Drummond's acceptance, of 6th Nov. 1747, for £205. 6s., to lie as a deposit till applied.” To which there was the following answer :—“ Sir,—Having received from you the sum of £205. “ 6s. by Mr. James Drummond's acceptance of the 6th Nov. “ 1747, the same, when paid, shall lie as a deposit, as your “ letter of the 7th ult. has directed, until applied.”

Sometime thereafter, and before the bill fell due, Mr. Grosett gave directions for the application of £92. 3s. 9½d. of this sum. When the £205. 6s. bill fell due at Candlemas 1748, no demand was made by the Receiver-general for payment against Drummond, the acceptor, and the first demand for payment made against him was on 2d August 1748, six months after the bill became due, when, and not before, it was protested for non-payment, and no notice was given of this protest to Grosett, the indorser, for five months thereafter, when the acceptor, Drummond, had become bankrupt. Action was then raised for payment of the bill by Grosett, who, in the meantime, was compelled to account to the Exchequer for the amount, against the Receiver-general, on account of his neglect duly to negotiate the bill, by which the contents thereof were lost. Defence stated by the Receiver-general. That he was only chargeable with the

money he actually received, and was not bound to accept of bills from the Collectors of customs; and that when he did accept of those out of the ordinary course, he was not bound to strict negotiation. After a proof of the respective averments of parties, the Lords sustained the defence, and assoilzied the defender from the conclusions of the action; but found no expenses due.

Against this interlocutor an appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—That, by the law and custom of merchants relating to bills of exchange, the holder of any bill is bound to use all legal diligence, when the bill falls due, for the recovery of its contents, in case of non-payment; and was, therefore, bound to due negotiation. The respondent, in the present case, ought to have caused the bill to be protested, and the usual notice thereof to be given to the indorser; which not having been done, he by his failure in so doing, makes, and has made, the bill his own. The defence, that bills were not the legal payment for sums recovered by the Collector of customs was untenable; and is disposed of by the fact, that this practice of payment has been long in use, and was actually sanctioned, and formed a part of the Collector's instructions. Besides, the Receiver-general had acquiesced in such mode of payment; and he could not have come to any possible loss by such arrangement, if he had duly negotiated the bill in question.

*Pleaded for the Respondent:*—The Collectors of customs are ordered “to pay to the Receiver-general, the monies “from time to time received by them, describing upon what “particular branches of the revenue such monies are re-“ceived;”—That the Commissioners of Customs have allowed the Collectors, by the 4th article of their instructions, to remit their receipts “to the Receiver-general, *by good bills of exchange,*” but it was never agreed, nor any way arranged, that the Receiver-general was to undertake any risk to the prejudice of the revenue; or to run any hazard by this method of remittance; and the present case must stand on a different footing altogether from a bill of exchange indorsed and remitted by one merchant to another, for value in the course of trade. In such a case, due negotiation was necessary, but no such obligation devolved on the Receiver-general, who is accountable only for the actual money he receives, and to his Majesty. *Seperatim.* Where a debtor, for his own convenience, sends his creditor a bill, to be applied when paid, in discharge of his debt, it never was held, that

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the creditor is bound to a strict negotiation, because the creditor is entitled to payment from his debtor directly, without subjecting his right to the contingency of insolvency. The present case was still stronger, because Grossett was not debtor to the Receiver-general, but to the King.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of in the said appeal be, and the same is hereby reversed; and it is further ordained, that the respondent is liable to the appellant, as representative of his father, deceased, for the sum of £205. 6s., lost by the insolvency of James Drummond, the acceptor of the bill of exchange in question, but is not liable to any interest on account thereof.

*Note.*—This decision alters the rule decided in *Alexander v. Cumming*, that a bill indorsed in security does not require due negotiation. Vide M. 1582.

<b>LADY DOWAGER FORBES</b>	-	-	<i>Appellant;</i>
<b>LORD JAMES FORBES</b>	-	-	<i>Respondent.</i>

House of Lords, 29th January 1765.

**REDUCTION—ERROR IN ESSENTIALS OF AGREEMENT—LIFERENTER'S POWERS AND LIABILITIES—BONA FIDE CONSUMPTION.**—Where the husband and wife, by marriage articles, conveyed the estate to themselves, and the survivor of them, for the wife's liferent use allenarily, reserving power to grant provision to daughters to the extent of £3000, and failing the husband exercising this power to the wife: Held, (1st,) That though the husband had granted provisions to his daughters in exercise of this faculty, to the extent only of £2000, that the wife was entitled, after his death, to execute an additional bond to the extent of £1000. (2nd), That where the liferentrix had entered into agreements restricting her liferent rights, through error in essentials, that she was still entitled to claim her rights as originally settled. (3d), That *bona fide percepti et consumpti* was not pleadable, and the respondent accountable, for the whole rents, feu-duties, and casualties since the date when her right accrued, reversing the judgment of the Court of Session: But, (4th), That she was liable for the interest of the heritable debts on Puttachie and Pittendriech.

FOR the first branch of this case, which was remitted back from the House of Lords to discuss the remaining points, *vide ante*, p. 36.

The questions involved were brought into Court, by Lord Forbes instituting an action of reduction against Lady Forbes, to set aside her new infestment taken in the lands *quoad* the subjects not contained in her infestment of 1730; and also *LADY FORBES v. LORD FORBES.* for reduction of the heritable bonds, granted to her daughters by way of additional provision, and to have her compelled to pay the interest of the heritable debts, and to discharge him of the arrears of her liferent interest, in terms of the deeds of restriction, &c.; which reduction, being met by action of reduction at the instance of Lady Forbes, seeking, 1st, To reduce the deeds of restriction, and for payment of the arrears of her liferent from her husband's death; 2d, For declaring her right to the liferent of the superiorities and patronages, in virtue of the contract of marriage, and for payment of the bygone feu-duties; and, 3d, For payment of the rents of the lands of Puttachie and Pittendriech, which had been possessed by Lord James, both before and since his brother's death, up till his own death in 1761.

The marriage contract in question contained a clause of warrandice, by which Lord Forbes bound himself to warrant the liferent conveyance to his wife, "free of all former infestments, liferents, annualrents, inhibitions, adjudications, or incumbrances."

After it was entered into, Lord Forbes being indebted to his brother James (the respondent's father, afterwards Lord James Forbes), in 1500, he, by contract with James, disposed in wadset his lands of Puttachie and Pittendriech, and obliged himself to infest James therein, subject to redemption. James was infest, entered into possession of the lands, and enjoyed the rents during Lord Forbes' lifetime, and afterwards until his own death in 1761.

Lord Forbes also became indebted, during the marriage, to his brother in the sum of £2000, to Sir William Forbes in £1000, and to Mr. Ogilvy of Balbegno in £400. These were secured by heritable bonds, and infestments were taken thereon, except on that of Mr. Ogilvy.

In 1730 Lord William Forbes died, and, as already explained, had executed, six days before his death, the bonds of provision in favour of his daughters for £2000.

Thereupon Lady Forbes was infest in the estate of Forbes; but, besides that, there were other estates conveyed, and particularly described in the marriage contract,—namely, the lands of Puttachie and Pittendriech, in which no infestment was taken, nor was any infestment taken in the parishes

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where lay the rights of presentation, the superiorities, and feu-duties,

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The deeds of restriction were then entered into, agreeing to restrict her liferent provisions to the free liferent of the estate, after the annualrents of all heritable debts were paid, by which she further agreed to discharge all arrears of her liferent. These deeds were entered into on the representation on the part of Lord Forbes, that the estate was nearly exhausted with debt; while, on the part of Lady Forbes, they were entered into in the belief that her daughters' bonds of provision were reducible on the head of deathbed; and it was made a condition in the deeds, as part of the consideration for granting them, that these bonds were not to be impugned or questioned on that head.

But upon Lady Forbes being afterwards made aware of her rights, she took new infestments over the whole estate of Forbes, comprehending not only the whole property lands, including Puttachie and Pittendriech, but also the superiority lands and patronages.

After the cases had been remitted from the House of Lords, to discuss the reasons of reduction *quoad ultra*, Lord James Forbes died, who was succeeded by the respondent.

At this stage, the daughters of Lady Forbes brought their actions for their provisions; and Lady Forbes brought a new action for payment of the whole bygone feu-duties received by his father since 1730. And she having moved the Court, under the remit for application of the judgment of the House of Lords, this was done, the respondent only objecting in so far as it called on the Court to find that she, as liferentrix, was not liable in the interest of the heritable debts.

On resuming consideration of the whole cause, the Lord Ordinary, Bankton, to whom the case was remitted, found, in terms of the judgment of the House of Lords; and in regard to the case otherwise, made "avizandum to the Lords, " with the other points of the cause; and ordains both "parties to give in memorials."

The new actions were then conjoined.

Lady Forbes maintained that the deeds of restriction of the marriage provisions ought to be reduced, as having proceeded on a gross and fundamental error, she having been induced to believe that the bonds of provision granted to her daughters were good for nothing, and liable to challenge on the head of deathbed, which was not the case, and she maintained, that the infestment of Lord Forbes in the lands,

which followed this agreement, ought to be set aside, in so far as it may bar her right to the rents of these lands during her life, and also for decree against him for the back rents of these lands, as well as the feu-duties, since Martinmas 1730, being the date of the agreement, and for count and reckoning, and payment. In answer to this, it was contended, that the rents and the feu-duties were intromitted by the respondent's father *bona fide*, and upon the faith of the agreement entered into by the appellant, and that she was not now entitled to restitution; that the deeds of restriction were fair and reasonable, in the circumstances of her husband's estate. That the additional bond of provision, granted by her, after her husband's death, was null and void, as she had no power to grant it after her husband's death; and on his death this power ceased—and that a liferentrix was bound to keep down the interest of the heritable debts, during her possession. The Court remitted to the Lord Ordinary to allow a proof of the averments.

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After proof of the respective averments of the parties, and minutes of debate,—The Lord Ordinary pronounced this interlocutor: “ Having considered the debate, sustains the defense of *bona fide percepti et consumpti quoad* any feu-duties paid to the late Lord Forbes, prior to the interlocutor of this Court of the 2d August 1758, and *quoad* any entry money, or casualties of superiority, received by his Lordship, anterior to the judgment of the House of Lords, in February 1760, upon granting entries to the vassals preceding that period; and finds the defendant, Lord Forbes, liable as heir, *cum beneficio inventarii*, in all such paid and received by his father, subsequent to the said times.” And upon advising a representation for the said Lady Forbes, and answers, the Lord Ordinary refused to alter, and adhered. Upon a petition to the Court, and answers thereto, the Lords having advised the state of the process, testimonies of witnesses, writs produced, and above debated, they repel the reasons of reduction of the deed 1730, and articles 1735; but sustain the reasons of reduction pleaded by Lord Forbes, of the additional provision of £1000 sterling, by Lady Forbes, to the younger children in 1752; and remit to Lord Ordinary who pronounced the act, to proceed accordingly.” Of the same date, their Lordships pronounced this interlocutor,—“ The Lords having advised the state of the process, testimonies of the witnesses, writs produced, and having heard parties procurators with respect to the wadset of Puttachie, and Ogilvie of Balbegno's

July 5, 1762.

Dec. 15, —

Jan. 19, 1763.

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Against these interlocutors, Lady Forbes brought an appeal to the House of Lords, in so far, 1st, As the defence of *bona fide percepti et consumpti quoad* the feu-duties was concerned; 2d, As they repel the reasons of reduction of the deeds of restriction 1730, and articles 1735; 3d, As also during her possession of the lands of Puttachie and Pittendriech, she was liable in the interest of the wadset debt of £1500; and the annualrent of Ogilvie’s bond, &c.

*Pleaded for the Appellant.*—The effect of the deed of restriction of 1730, is to release the estate from the arrears of the jointure, to be incurred by reason of Lady Forbes keeping down the interest of the heritable debts ; such release to be absolute, in case the bond of provision should stand ; if not, then the arrears not exceeding £2000, were stipulated to be security in favour of the daughters, to that amount ; and it is submitted that this deed ought to be set aside, the same having been obtained from Lady Forbes by surprize, and upon fundamental error ; and by fraud and imposition, so far as the release of the arrears was extended to the collateral branches of the family. The deed was granted six days after the death of her husband, and before she was acquainted with, or advised on the circumstances of her husband’s affairs, and her own

rights under the settlement; as also, it proceeded on the supposition, that the bonds of provision executed by her husband, in favour of her daughters, a few days before his death, were subject to the law of deathbed; which was not the case, and it was to save their interests, as thus challengeable, that the deed was entered into. The deed of 1735, in like manner, ought to be reduced; because it was executed in entire ignorance of her rights, namely, that she was infest in the superiorities, feu-duties, and casualties, as well as the liferent of the lands, which turned out *not* to be the case; and also, on the supposition that his daughter's bonds of provision were reducible on the head of deathbed; and having restricted her rights, and given up her claim to the arrears of surplus rents, on this mistake, she was not bound by these deeds; hence, therefore, she is entitled to the surplus rents, to the superiorities and casualties, and feu-duties, nor can the defence of *bona fide percepti et consumpti* avail, because, in point of fact, it was not *bona fide*, he being in the knowledge of these facts. 2d, The interest of the wadsett and heritable bond to Ogilvie, falls as a charge upon the inheritance, and not on the liferentrix. And, 3d, As to the additional bonds of provision, granted by her to her daughters, the same ought not to be reduced, because they were granted under express powers, conferred by the marriage articles, which bound her late husband to provide to the daughters provisions to the extent of £3000! He only provided before his death the sum of £2000, and as the marriage articles expressly provided, "that in case the said Lord Forbes should die, without making any provisions for such younger children, or should not charge the estate with the whole £3000 for that purpose, then, and in *either of these cases*, it should be lawful to the said Dorothea Dale (Appellant), if she survived him, to charge the said estate with the said £3000, or with such part thereof as should not be charged by the said Lord Forbes." She was, under this clause of the contract, entitled to grant the bond in question.

*Pleaded for the Respondent.*—The appellant had most unquestionably a power to restrict her liferent annuity over the estate of Forbes, and, consequently, if such restriction was deliberately made, it cannot be now retracted, and she must now be bound, unless she can show that it proceeded on force, fraud, or fear; but none of these grounds have been alleged or proved against the deeds, which have remained unchallenged and acquiesced in by her for a period of thirty years. That, besides, there were existing circum-

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stances in the deceased's affairs, which made such deeds of restriction necessary. He was owing of debt to real creditors £3400; £1500 to the respondent's father, and £2000 to the appellant's three daughters; and the interest of all these being a growing debt on the estate, must have carried off and exhausted the whole estate. If, therefore, the deeds of restriction are binding on the appellant, the only remaining point is, what do they cover? 2d, She became bound, by the agreement 1735, to pay the interest of these heritable debts. It embraces Ogilvie's bond of £400, as well as the wadset; which bond, although not expressly mentioned in the agreement of 1735, yet being an heritable debt, fell under the general clause thereof, as to all debts secured on the estate by indenture, and therefore that the interest of this, along with the other, fell, in terms of that agreement, on the liferentrix. 3d, The deed of provision for £1000, granted by her to her daughters, in addition to the £2000 granted to them by the father in his lifetime, the Court had justly set aside, because Lady Forbes, after her husband's death, had no power to grant additional provisions; and also because it was clear, from the marriage articles, that the £2000 was the utmost extent to which the parents could go in making provisions to the daughters, which latter bore to be in full satisfaction of all they could claim or demand out of the father's estate, and barred from all other claim. It was, besides, inconsistent with the then state of his affairs; and the faculty in the marriage contract ought not to be construed unfairly, and to the disadvantage of the heir, and ought not to be held to subsist after the father's death; but, on the contrary, to have ceased on that event.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the Lord Ordinary, of the 5th of July 1762, and the said interlocutor of the 15th December 1762 following, adhering thereto, be hereby reversed; and it is hereby declared, that the respondent is liable, as heir *cum beneficio inventarii*, for any feu-duties, entry money, or casualties of superiority paid to or received by his father, the late Lord Forbes; and it is further ordered, that so much of the interlocutors of the 19th January 1763, as sustains the reasons of reduction pleaded by Lord Forbes, of the additional provision of £1000 sterling, by Lady Forbes, to the younger children in 1752, be hereby reversed; without prejudice to the question concerning

the interest thereof, and the time from which the same should commence. And it is further ordered, that so much of the interlocutor of the 15th of February 1763, as finds that Lord Forbes is not accountable for any part of the rents of the lands prior to the date of the said interlocutor; and also so much as confines the account of the feu-duties and casualties, to be taken from the date of the summons only, be, and the same are hereby reversed; and it is hereby declared that the appellant, Lady Forbes, is entitled to an account of all the said rents, feu-duties, and casualties, paid to, and received by, the respondent's father, after her right accrued. And it is further ordered, that the said two last mentioned interlocutors, in all other respects, be hereby affirmed; and that the Court of Session do give all necessary directions for carrying this judgment into execution.

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For Appellant, *C. Yorke, John Maddocks.*

For Respondent, *Al. Wedderburn, Alex. Lockhart.*

*Note.—Unreported in the Court of Session. Lord Mansfield presided in giving judgment.*

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WILLIAM DALLAS,	-	-	-	-	Appellant;
JAMES DALLAS	-	-	-	-	Respondent.

House of Lords, 4th February 1765.

RATIFICATION—REDUCTION—FACILITY—MARRIAGE CONTRACT—FATHER'S POWERS—PROVISIONS TO CHILDREN—SECOND MARRIAGE.—A father, in his son's contract of marriage, conveyed his estate to his son and his intended wife in liferent, and the heir male of that marriage in fee. The son thereafter executed an entail of the estate to George, his eldest son, and heir male of the marriage, and a series of other heirs substitutes, reserving power to burden and alter. After his wife's death, he married a second time, and provided in the marriage settlement for the issue of the second marriage out of separate estate. He thereafter executed additional provisions in favour of the children of the second marriage, and burdened also the estate conveyed to the heir male of the first marriage, as well as granted a lease of the same for 40 years. The heir male of the first marriage was facile, and had been prevailed on to ratify the entail, and these subsequent deeds of provision. Held, that his son was not barred by his father's deeds of ratification from challenging the entail and provisions

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charged on the estate in favour of the second marriage; these ratifications having been obtained from a weak and facile person.

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JAMES DALLAS, eldest son of George Dallas of Ferrytoun, married Elizabeth Riddle; and on that occasion an antenuptial contract of marriage was entered into, (1683,) to which his father (George) became a party, and by which his father conveyed his estate of Ferrytoun to him and Elizabeth Riddle in liferent, for her liferent use allenarily, and to the heirs male of the marriage in fee.

1694. The estate of Ferrytoun thus conveyed was thereafter sold; and, with the price, the estate of North Newton was purchased, and the rights taken in precisely similar terms. Upon this conveyance charter was obtained under the great seal, and they were infest. Thereafter George Dallas of Ferrytoun, his father, died, and James, his son, succeeded.

James's wife died in 1702, leaving issue of this marriage three sons and five daughters.

1703. He married a second time, and in his marriage settlement became bound to infest his second wife in liferent, and the heirs and bairns to be procreated between them,—whom failing, his own heirs whatsoever,—in a house in High Street, Edinburgh, as well as an annuity.

Of this second marriage there were thirteen children.

1733. James Dallas then executed an entail of the lands purchased by himself in favour of George Dallas, the eldest son of his *first* marriage, and a series of heirs, reserving power to alter. A family jewel, worth £500, was also conveyed to him at same time. He afterwards made additional provisions to the children of the second marriage, and burdened the estate therewith, and also conveyed the family jewel to the appellant, and granted a lease of the house and garden,

1739. and three acres of land of North Newton, to endure for 40 years, for £25 of yearly rent.

After James Dallas' death, it being represented to his eldest son, George Dallas, that the debts of the deceased exhausted the value of the estate, they, taking advantage of his facility and weakness, prevailed on him to grant a deed of agreement, whereby they made him to "ratify, approve, and confirm the foresaid writs, particularly above mentioned, with whole heads, clauses, articles, and conditions thereof, and become bound never to quarrel or impugn the same." He was also made to execute another deed, confirming the same, and agreeing to accept an annuity. Under

this agreement George Dallas continued to receive his annuity until his death. On this event, his son, the respondent, brought an action of reduction, to set aside the above deeds of agreement and ratification, and also the deed of entail as in contravention of the marriage articles. This action was referred to arbiters, who declared the entail void and null. But parties not acquiescing, mutual actions were brought; and that by the appellant was conjoined with the reduction brought by the respondent, to set aside the deeds of agreement and ratification executed by his father, on the head of facility; and the deed of entail as *ultra vires* of him, and in fraud of the marriage settlement.

The appellant, in bar of the respondent's action for setting aside the deeds executed by James Dallas in favour of the children of the *second* marriage, pleaded the deeds of ratification granted by George Dallas, as well as homologation. The respondent maintained that the deeds of ratification executed by his father were no bar to the reduction; because these deeds of ratification were themselves reducible, and here sought to be reduced, on these grounds, 1st, That his father was of weak mind, facile, and easily imposed on—that this was proved by James Dallas's entail, which sets forth that incapacity as an inducing cause for the deed. 2d, That those deeds of ratification were greatly to his prejudice, for he was made not only to ratify that entail, but also the additional provisions to the children of the second marriage, of £500 to the appellant, William, as well as the conveyance of the family jewel to him; and therefore, these deeds were obtained by fraud and circumvention.

After a proof of the state of George Dallas' mind at the time he executed the deed of ratification, the Lord Ordinary, upon considering it, " found George Dallas' imbecility July 8, 1761. " is not proved, and William Dallas, upon his interest, was " entitled to be preferred." But the Lords, on reclaiming petition, found " that the pursuer, by the acts and deeds Jan. 12, 1763 " of ratification done and executed by his father, is not " barred from challenging the deeds founded on by the " defender, (appellant,) and executed by the pursuer's " grandfather; and remit to the Lord Ordinary to proceed " accordingly; and also to proceed further in the case as " he shall see just." And, on another reclaiming petition, Mar. 11, — the Court adhered.

Against this interlocutor the present appeal was brought to the House of Lords.

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*Pledged for the Appellant:*—*1st*, That James Dallas had power, notwithstanding the marriage settlement, which conveyed the estate to the heir male of the marriage in fee, afterwards to convey the said estate to the said heir male, and a series of other heirs substitutes, under the limitations of a strict entail, and also to execute the other subsequent deeds of distribution, these being within the power of disposal of the father, and were besides rational and reasonable in the circumstances, and neither unequal, unjust, nor incompetent, though in favour of the children of the second marriage; *2d*, Moreover, when old George Dallas died, it was found that his estate was greatly encumbered, and to such an extent as to make it difficult for his son James to interfere without the consent of all interested therein. Accordingly, the deeds of agreement and ratification were entered into, in the most open and fair manner, and with the sole object of benefiting the estate. His eldest son George, at that time, was perfectly sound in mind, and the whole transaction itself was the most rational in the circumstances of the deceased's affairs. His capacity is established by those who knew him best—by those who knew him from infancy; and their evidence is only contradicted by those who had not the same opportunities of knowing him, and who gave their opinion, without stating any reason for that opinion.

*Pledged for the Respondent:*—*1st*, James Dallas having purchased the lands of North Newton, with the price of the lands of Ferrytoun, which were settled upon the heir male of his first marriage in fee, it was not in his power afterwards to convey it under the strict limitations of an entail, and to burden it with provisions to the children of his second marriage.

*2d*, It is satisfactorily made out by the proof, that George Dallas, at the time of executing the two deeds, was a “weak man.” One witness says, he was “crack-brained;” another, “a very weak man,” and this evidence is further corroborated by other evidence equally strong. It was corroborated by the father's deed of entail itself, which set forth his son George's incapacity. Besides this, he was in a most miserable starving condition, and undue advantage was taken of his distress, as well as weakness, to make him sign these deeds, by which an estate was conveyed away from him worth £100 per annum, without the least consideration.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of, be affirmed.

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For Appellant, *Al. Wedderburn, C. Yorke.*

For Respondent, *Al. Forrester, W. Johnstone.*

M'LEAN

v.

M'LEAN, &amp;c.

*Note.—Unreported in the Court of Session.*

JOHN M'LEAN of Lochbuy, - - - - - *Appellant;*  
MARY M'LEAN and Husband, - - - - - *Respondents.*

House of Lords, 8th Feb. 1765.

**CONDITIONAL BOND—APPARENT HEIR**—A bond was granted by a grandfather to his granddaughter, under the condition that it was not to be alterable, except in the event of her marrying without his consent, or the consent of parties named. She married, after her grandfather's death, without the requisite consent. Held the bond still good, and binding on the heir taking his estate, though the grandfather only possessed on appurtenance.

A bond of provision was executed in favour of the respondent Mary M'Lean, by her grandfather, in the following terms:—“ For the love, favour, and affection, which I have “ for my granddaughter, I bind and oblige *myself, my heirs,* “ (succeeding to the estate), under the provisions and de- “ clarations after mentioned, to make good payment to the “ said Mary M'Lean, my granddaughter, of the sum of 7000 “ merks, in name of additional portion and provision, at the “ first term of Martinmas after his death.”—The provision and declaration referred to was,—“ That the same shall be “ unalterable and irrevocable, except in the event that my “ granddaughter shall marry without my consent if in life, “ and failing of me by decease, without consent of two of “ her nearest friends, for the time, on the father's side, or “ without consent of Alexander M'Dougall, her uncle by the “ mother, and failing of him by decease, without consent of “ two of her nearest friends, for the time, on the mother's “ side.”

After the grantor's death, his granddaughter eloped with the other respondent, Allan M'Lean, to whom she was married, without consent of the relations named.

She thereafter, with consent of her husband, raised action for payment of the bond of provision. In defence, it was

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pleaded, that the bond of provision being conditional,—namely, on her marriage with the consent of the parties named, and as she had married without their consent, and had not complied with the condition, she had forfeited her right. Besides, the grantor had no right to burden the succeeding heir with this provision, as he was himself only an heir apparent, and had never made up titles.

June 17, 1761. The Lords, of this date, repelled the whole defences, and found “the defender liable to the pursuer in payment of June 19 & 30. “the bond.” And on further petition they adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—John M'Lean, the grandfather, possessed only as apparent heir; and never having made up titles to the estate, could not burden it with deeds or debts, not strictly onerous,—That the bond in question was gratuitous, and a donation in its nature. It was further, a mere voluntary bond, and therefore every condition or restriction attached to its payment, must be strictly complied with; and, as the condition attached to the payment of this bond was, that she should not marry, without the consent either of the grantor, or certain parties named, and as she had violated this condition, the donation must be considered as void and forfeited.

*Pleaded for the Respondents.*—The bond of provision is onerous, because it was founded on an obligation in nature; for the grandfather, after the death of her own father, stood then *in loco parentis*, and lay under an obligation to provide for his only grandchild. It is therefore good against every one but creditors, which certainly the appellant was not; and if it was good by the law of nature and equity, it was equally good under the act 1695, regarding apparent heirs; the grandfather having held the estate for more than three years, in which case, every rational debt and obligation is binding on him. And as law views all restrictions on marriage as ineffectual, the bond, even if considered purely conditional, would still remain good, though the condition of marrying with consent of certain parties had not been complied with, such condition being held as *pro non scripto*.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be affirmed.

For the Appellant, *Al. Wedderburn, W. Johnstone.*

For Respondents, *Al. Forrester, C. Yorke.*

*Note.*—Unreported in the Court of Session.

[M. 15,611.]

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<b>LORD KINNAIRD,</b>	- - - -	<i>Appellant;</i>	<b>KINNAIRD</b>
<b>HUNTER and Others,</b>	- - - -	<i>Respondents.</i>	<b>v.</b> <b>HUNTER, &amp;c.</b>

House of Lords, 18th February 1765.

**RECORDING ENTAILS.**—An entail contained no express prohibitions against granting leases, and the heir granted leases of 11, 19, and 38 years' duration: Held, in a reduction of the leases, that they were good against singular successors, the entail not having been recorded, although executed before the date of the act 1685.

**REDUCTION** of certain leases, one for 19 years, one for 11 years, and one for 38 years, alleged to be granted in contravention of the strict prohibitions of an entail, directed against “*selling, alienating, disposing, and dilapidating the said estate, or any part thereof, or to do any act by which the same might be evicted, or otherwise affected, in prejudice or defraud of the subsequent heirs male and of tailzie.*” In defence, it was stated, that the entail contained no express prohibitions against granting leases for any number of years, and, therefore, that the heirs of entail were, in this respect, unrestricted. Besides, the entail was ineffectual to protect against such leases, because it had not been registered in terms of the act 1685. The lessees were to be viewed as singular successors, and however valid the unrecorded entail might be as in a question between the heirs of entail, yet it was ineffectual against singular successors. To this it was answered, that the act did not apply to entails executed before the date of the act; but to this it was replied, that it had been settled in the entail of Rothes, that such entails *Vide supra.* required to be registered.

The Lords pronounced this interlocutor :—“ That the requisites of the act of Parliament 1685, not having been complied with, with respect to the foresaid tailzie, that the same is ineffectual against singular successors, and repelled the reasons of reduction, and assailed and discerned.”

Against this interlocutor the present appeal was brought to the House of Lords.

**Pleaded by the Appellant.**—An entail, with prohibitive and irritant clauses, though never recorded in terms of the

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act 1685, is effectual, in any question among the heirs of entail, and will bar all gratuitous deeds, to the prejudice of the subsequent heirs; but the question here is, Whether such an entail is effectual against singular successors, or purchasers for a valuable consideration? In the present case, the act as to recording has been sufficiently complied with, by recording the charter which proceeds upon the entail, and which contains the names of the maker, the heirs of entail, and the description of the lands, and the whole limitations. This ought to be held a sufficient recording, to protect the estate against singular successors. But even if it were otherwise, the entail here having been executed antecedent to the act, that statute regulating registration did not apply.

*Pleaded for the Respondents.*—It has been finally settled, that the act 1685, as to the registration of entails, applies to those before, as well as those executed after the passing of the act, whether perfected by charter or not. Therefore, not less than the most literal compliance with the requisites of the act can support the restraints imposed by entails.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, W. Johnstone.*

For Respondents, *C. Yorke, R. Mackintosh.*

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[M. 15,516, et Fac. Col. iii. 359.]

JOHN YOUNG of Newhall, Esq., - - - *Appellant;*  
 MARGARET, the widow of John Scot Nisbet of Craigentinny, Esq., deceased; CHAMBRE Lewis, Esq., and THOMAS TOD, Disponees of the said John Scott Nisbet, - - - *Respondents.*

House of Lords, 21st February 1765.

**ENTAILS—GENERAL CLAUSE—PROHIBITIONS AGAINST SALES.**—An entail contained a general clause, prohibiting the heirs from doing any fact or deed in prejudice of the succeeding heirs of entail, but no special prohibition against sales: Held the general clause not sufficient to protect against sales.

In 1722, the deceased William Nisbet of Dirleton executed an entail, containing strict prohibitory, irritant, and re-

solutive clauses. It declared, "That it shall be no ways  
"leisome or lawful to any of the said heirs male or female  
"to do any facts or deeds in prejudice of the other heirs,  
"their rights of succession; and which facts and deeds, all  
"and each of them shall not only be void and null, in so far  
"as concerns the said lands, so as the same shall not be  
"therewith affected or burdened, but likewise the contra-  
"veners shall forfeit and omit their right and interest in the  
"said lands, and the same shall devolve, pertain, and belong  
"to the next heir, in the order of the above destination."

The entail was duly recorded.

By failure of nearer heirs, the estate opened to John Scot Nisbet of Craigintinny, second son of Sir John Scot of An-crum, by Christian Nisbet, the granter's eldest daughter; and having entered into a contract of sale of the estate with the appellant, the question was, whether the entail protected the estate against a sale?

The Court of Session held that the entail did not protect Nov. 17, 1763.  
against sales.

Against this interlocutor the present appeal was brought.

*Plead ed by the Appellant.*—It appears from the numerous series of heirs called to the succession, and especially from the clauses whereby the heirs female are obliged to assume the name and arms of Nisbet, as well as from the power reserved to himself, without the consent of his next heir, or any other heir of entail, not only that it was his intention, but that he understood he had actually prohibited the sale or alienation of his estate, by the words which he has used. Undoubtedly the entainer attached such meaning to the following words: "That it shall not be lawful to any of the said heirs male or female to do any facts or deeds in prejudice of the other heirs, their rights of succession;" and this being the case, and this clause being general and comprehensive in its terms, it makes no difference in law or reason, whether every particular act prohibited be expressly enumerated or not, if by the obvious sense and meaning of that clause, sales be clearly and distinctly prohibited. Hence there can be no doubt of the will of the granter; and where it is so clear as in the present case, it ought to form the rule, as it does in every other case, in regard to the construction of a settlement.

*Plead ed for the Respondents.*—The intention of the entainer can have no place in the construction of entails, which, imposing unjust restraints on property, are no favourites of

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the law, and therefore receive a strict interpretation. What is not expressly prohibited, cannot be implied, however strong the language be, which is drawn from other parts of the deed, to support that implication. Where, therefore, an entailer has not inserted in his entail, a prohibition against selling, he must in law be presumed not to have intended his estate to be protected against sales. The present entail contains no prohibition against selling, and therefore cannot protect against sales; and the general words of prohibition against doing any "fact or deed prejudicial to "the succeeding heir's" rights, are not in law sufficient to prevent a sale of the estate.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be affirmed.

For Appellant, *C. Yorke, R. Macintosh.*

For Respondents, *Al. Wedderburn.*

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JOHN CATHCART of London, Merchant, - *Appellant;*  
ALEXANDER BLACKWOOD, Merchant, Edinburgh, *Respondent.*

House of Lords, 26th February 1765.

**BANKRUPTCY—FOREIGN—CERTIFICATE AND DISCHARGE**—A company in London became bankrupt, and, under the bankruptcy, obtained a certificate and discharge. Some years thereafter an action was raised by a creditor who had ranked and obtained his dividend out of the estate for payment of his debt, against the surviving partner in Scotland: Held that the discharge and certificate protected him, in terms of the 5 Geo. II. c. 30, § 70: and that concealment of property in Scotland, which did not then belong to him, was no bar to the benefit of the act.

IN the year 1726, the appellant, John Cathcart, entered into partnership with John Blackwood of London, brother to the respondent, in a foreign shipping trade, which, from various causes, proving unfortunate, the company was obliged to become bankrupt in August 1745, and a fiat of bankruptcy issued in England. When this event happened, the appellant had no personal effects whatever to hand over to his creditors, under the commission of bankruptcy, except his half-pay.

Thereafter, having conformed in all respects to the provisions of the bankrupt statute, the company procured the Lord Chancellor's certificate and discharge.

The appellant, out of honourable feelings, and notwithstanding the certificate and discharge, and the dissolution of the company, had, from time to time, paid several of the company debts, arising out of the savings from his half-pay, and his own industry. In this way he had paid, from the date of the certificate to the 7th December 1758, £2479.

The respondent was creditor of the company, and had ranked on the estate, and received his dividends. The appellant would have paid his claim also, had he found it consistent with other preferable demands. It was consequently left to be paid by his partner, John Blackwood, the respondent's brother; but, in the hope of enforcing payment of his claims, the respondent raised the present action.

In defence, the appellant pleaded the certificate of bankruptcy, obtained and allowed by the Lord Chancellor, and the statutes of England, in bar of the action, and, in particular, 5 Geo. II. cap. 30, § 7, whereby it is enacted,—“ That “ all bankrupts, who shall surrender and conform, as by that “ act directed, should not only be entitled to the allowances “ out of the neat produce of the estate, as therein mentioned; but shall be discharged from all debts owing at the “ time that such persons did become bankrupt; and, in “ case such bankrupt shall afterwards be impleaded for any “ debt due before he became bankrupt, such bankrupt may “ plead in general, that the cause of action did accrue before the time he became bankrupt, and the certificate of “ such bankrupt's conforming, and the allowance thereof by “ the Lord Chancellor, shall be sufficient evidence, preceding to the obtaining such certificate, unless the plaintiff “ can prove the said certificate was obtained unfairly, or “ make appear any concealment by such bankrupt to the “ value of ten pounds.”

In answer, the respondent pleaded the exception of the statute as to concealment of estate, and offered to prove the appellant's ownership of lands in Ayrshire, and a house in Edinburgh, at the time of his bankruptcy. The appellant replied that these, at the time of his bankruptcy, did not belong to him, but to his father, and were enjoyed by him in fee simple,—and that at the time of his bankruptcy, he had

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made a full disclosure of his probable eventual interest in these lands, which were only £10 of yearly rent.

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Proof being allowed of the value of the farm called Glendusk, being the lands alluded to, it was established, that at the time of the surrender, the farm was let at £9. 3s. 4d. yearly rent.—That he had never made up titles to the house in Edinburgh,—never intromitted with the rents, but that these had been uplifted by an agent after his father's death, to pay his father's debts, and afterwards by his sister, and others for her behoof.—That when sold, the house in Edinburgh would not yield more than £50.

On this proof, the Lord Ordinary pronounced this inter-

July 7, 1761. locutor :—“ Having considered the state of the process, af-  
“ fidavit of John Blackwood, which the pursuer (respondent)  
“ agrees shall have the same effect as if it had been regu-  
“ larly emitted on oath, on a commission from this court,  
“ and having also considered the opinions of counsel learned  
“ in the law of England, produced for both parties, with the  
“ list of debts alleged by the defender (appellant), and not  
“ denied by the pursuer to have been paid by the de-  
“ fender since his bankruptcy, and whole other circum-  
“ stances of the case ; finds it *not* proved that the defender  
“ has been guilty of any such fraudulent concealment as is  
“ sufficient to deprive him of the benefit of the certificate  
“ granted by the commissioners, and confirmed by the Lord  
“ Chancellor ; and, therefore, sustains the defence founded  
“ on the said certificate, assoilzies the defender, and de-  
“ cerns.”

On representation, the Lord Ordinary made avizandum with the cause to the Inner House ; and, upon advising the Nov. 17, 1762. case, their Lordships, of this date, “ repelled the defence founded upon the Lord Chancellor's certificate, and de-

July 22, 1763. “ cern.” On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—In every fraudulent concealment, the bankrupt must have two things in view, 1st, to conceal a fund, which, if discovered, could be attached by his creditors ; and, 2d, to derive profit by such concealment to himself. Without a prospect of both these, it is impossible to see an object in the concealment, or any fraud as its ultimate end. Neither of these was, in the nature of things, applicable to the present case. Personal effects may be con-

cealed, but lands and tenements could not. But it was shewn, from the whole conduct of the appellant towards the company creditors,—a conduct highly honourable to him,—both before and after the bankruptcy, that he could have no intentions of concealing any thing from them, but, on the contrary, had manifested an honest desire to pay every one, as was evident, by his paying several claims after obtaining his certificate; as also, his bringing under the creditors' notice the existence of the lands in Scotland. Accordingly, in regard to the lands of Glendusk, he had made a full disclosure of his interest in these on his judicial examination, stating that these lands belonged to his father, were worth £10 of yearly rent; and were adjudged for a bond to an amount equal to the value thereof; and, in regard to the house in Edinburgh, the reason why no disclosure was made of this was, that at this time it belonged to his father, and his sister being then alive, and behoved to be provided for after his father's death, she was allowed to uplift the rents.

*Pleaded for the Respondent.*—The 7th sec. of 5 Geo. II. does not require the concealment to be fraudulent, for the purpose of voiding the certificate, and enabling the plaintiff to recover his debt; every concealment to the value of £10, whether arising from negligence, inattention, or misunderstanding the nature of the interest concealed, is equally within the act.—The appellant having been guilty of concealment, beyond the value of £10, in two instances, is not entitled to plead the benefit of the act, in bar of the present action.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors of the Lords of Session, of the 17th of November 1762, and 22d of July 1763, complained of in the appeal, be *reversed*; and it is further ordered, that the interlocutor of the Lord Ordinary of the 7th July 1761 be, and the same is hereby affirmed.

For Appellant, *Tho. Miller, C. Yorke.*

For Respondent, *Fl. Norton, Al. Forrester.*

*Note.*—The grounds upon which this reversal proceeded, rest on the effect due to the Lord Chancellor's certificate, which, as a decree of a supreme Court, must have effect given to it in all other courts, without entering into its merits. It also appeared that the omission was accidental. In the subsequent case of *Watson v. Renton*, 5th

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1765. March 1791, (Bell's Cases, 93), Lord Justice Clerk Macqueen explains this doctrine, and the effect due to the Lord Chancellor's certificate, in these terms :—" The Chancellor's certificate is as effectual a discharge as payment is with respect to all debts due by an Englishman living in England. The creditor cannot attach a debtor who has such a certificate in England ; must not we also protect him ? I have a *res judicata* in England, freeing me from a demand ; I come to Scotland, can I be taken up there on an action upon the same ground ? No." A *res judicata* is good all the world over ; the courts have no right to review this final judgment. On the other hand, if I want execution on an English decree, the other party cannot defend himself against it, otherwise than by shewing that the decree is unjust by the law of England. If the decree be liable to review, it must be reviewed in England ; if there be a judgment in the last resort, it can go no further. A man cannot be forced to go through every country in Europe with his defence."—There is a short notice of this case, M. 4579.

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HIS MAJESTY'S ADVOCATE	-	-	-	-	-	-	-	<i>Appellant;</i>
ARCHIBALD DOUGLAS of Douglas	-	-	-	-	-	-	-	<i>Respondent.</i>

House of Lords, 4th March 1765.

**PATRONAGE—RIGHT OF PRESENTATION.**—Circumstances in which held that the Crown was divested of the right of patronage, although in the original titles in favour of the party the words of the grant were general and not special, and although the exercise or possession of the right was not always enjoyed by him, but sometimes by the Crown, as coming in place of the Bishop.

THE united parish of Buncle and Preston became vacant in 1761 ; and a question arose between the respondent and the crown, as to which of them had the right of patronage, and of presenting the minister to the vacant benefice. The respondent brought an action of declarator against the Officers of State, to have it found that he had right, in virtue of a charter granted in 1547, by Queen Mary, to his ancestor Archibald Earl of Angus, which was ratified in parliament in 1567, and granted to him and his heirs therein named, the several lordships and baronies therein mentioned, and *inter alia* " Terras Dominium et Baroniam de Buncle et Preston, cum omnibus et singulis annexis, connexis, partibus, pendiculis, tenen. tenan. libere tenen. servitiis, molendinis, multuris, silvis, piscariis, *Advocatione et Donatione Ecclesiasticae*.

"*iarum beneficiorum et capellaniarum earundem et suis  
pertinen. jacen. infra vicecomitatum nostrum de Berwick,*"  
&c.

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The Earl of Angus was forfeited in 1581, and during the interval between this and his restoration, the crown, as in his right, exercised the right of patronage.

In 1602, having been sometime previously restored by King James, his Majesty granted a new charter to the then Earl of Angus, of the barony of Buncle and Preston, with the right of patronage of the churches thereof. This was renewed in 1698 to James Marquis of Douglas; and in 1707 Queen Anne, by charter in favour of Archibald Duke of Douglas, granted to him the lordships of Buncle and Preston, "una cum advocatione, donatione et jure patronatus" ecclesiarum beneficiorum, capellaniarum aliisque pertinen. "quibusunque dict. terrarum dominii de Buncle et Preston."

In virtue of this title, the family of Douglas had always exercised the right of patronage, with certain exceptions; these exceptions arising from being deprived of exercising the right by the political changes of the period. In 1582, the crown had exercised it after the earl's forfeiture. In 1665, being restored, the Marquis of Douglas presented on the next vacancy. In 1678, the Bishop of Dunkeld wrote a letter to the presbytery of Dunse, recommending a person on the next vacancy. The next vacancy, in 1696, was by a call from the heritors, the right of patronage having, in the meantime, been taken away by act 1690; and so also was the next vacancy in 1706. When patronage was restored, the right returned, as the respondent alleged, to his family.

On the other hand, the appellant claimed the right of patronage in question, to belong to the crown, as coming in place of the Bishop of Dunkeld, to whose see it was attached, as one of his mensal churches, which were churches inseparably joined to the bishopric, for the better support of the Bishop, and to which the Bishop, before the Reformation, had the appointment of the vicar, for the performance of the cure, to whom he allotted a yearly income, or stipend, out of the living. The bishop, for these purposes, had the whole right to the tithes of the parish, and, as a part of this right, the presentation accompanied or adhered thereto. When, after the Reformation, this system of church government was destroyed, the crown came in place of the bishop, and was now entitled to exercise the rights which he then exercised, in presenting ministers to the vacant benefice.

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In virtue of this right, the crown had exercised the right of presenting on several occasions, while the respondent could only stipulate one instance in 1665, in which his ancestors have exercised that right; the appellant therefore pleaded, that, supposing the right of the crown, as coming in place of the bishop, were doubtful, yet as the respondent claimed simply as the grantee of the crown, it was incumbent on him to shew that the crown had been divested in his favour in more express words than his titles set forth, and also that possession had followed on such grants. All that he shews is a title in very general terms, and only a doubtful possession.

Feb. 23, 1763. The Lords pronounced this interlocutor: "Found that the " pursuer, Archibald Douglas of Douglas, has the sole right " and title to the patronage of Buncle and Preston, and " therefore repelled the defences offered for the crown, and " decerned and declared accordingly."

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellant.*—By the law of Scotland, the crown cannot be divested of an anterior right of patronage by general words. In order to this, the conveyance must be precise and express. Possession is also necessary, in order to preserve such a right in a subject, otherwise, after the years of prescription, without such possession, it will revert back to the crown, from which the right has originally flowed. Here the respondent has failed to prove such a possession as in law amounts to a clear exercise of the right claimed. The "advocatione et donatione ecclesiarum beneficiarum et capellaniarum earundem et suis pertinen. jacen. infra vicecomitatum de Berwick," &c. are mere words of general style or form, and do not specially convey the patronage of the united parish of Buncle and Preston. Any subsequent renewals of that grant could not be extended beyond the rights previously conveyed; and this, when supported by the fact established, that the crown here has the first and the last act of possession, gives a clear right of preference to the crown of the patronage in question.

*Pleaded for the Respondent.*—The grant of the barony of Buncle and Preston gives the right of patronage of this united parish to the respondent. And although the earlier grants quoted are general in their terms, as *cum advocatione et donatione ecclesiarum earundem*, yet by the late grants in 1707 and 1761, the right is more special and precise, and less general in its terms, and conveys the barony of Buncle

and Preston, "cum jure patronatus ecclesiarum dict. terrarum dominii, &c., de Buncle et Preston, which can only mean the patronage of the church of the united parishes of Buncle and Preston. The addition of the words *beneficiarum et capellaniarum earundem*, cannot destroy the legal meaning and import of the preceding words. If chapels alone had been meant, then these words would have been sufficient, but the "ecclesiæ de Buncle et Preston," most certainly meant, that the parish church of Buncle and Preston were also carried. The supposition of the appellant, that this was a mensal church, because the great tithes were allotted as a part of the patrimony of the see of Dunkeld, is clearly disproved. Had this been the case, the minister, or curate, would on all cases have been sent to undergo his trials, and would have been appointed by the bishop, but, in place of this, it is in evidence, that the bishop recommended one minister to the presbytery, and that the presbytery, on all occasions, took the minister on trials, and admitted him, which would not have been the case had it been a mensal church. In confirmation of the respondent's right, there is a possession far beyond the years of prescription, so as to cut off all question on the part of the crown, even supposing any doubt existed, founded on the generality of the words of the respondent's grants. The possession and exercise of the right is proved in three instances beyond dispute; and if there was ever any doubt as to his title, this is put to rest by the charter in 1707, which is clear, express, and special in its terms, applying to the patronage of the church of Buncle and Preston.

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After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be, and the same are hereby affirmed.

For the Appellant, *Fl. Norton, Tho. Miller, C. Yorke.*  
For the Respondent, *Al. Wedderburn, James Burnet.*

*Note.—Unreported in Court of Session.*

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[M. 15,418, 15,461.]

**LORD NAPIER**

*v.*  
**LIVINGSTONE.** The Right Honourable FRANCIS LORD NAPIER, *Appellant*;  
 WILLIAM LIVINGSTONE, Esq. - - - - *Respondent.*

House of Lords, 11th March 1765.

**SERVICE—ENTAIL—SASINE—BONA FIDE POSSESSION.**—An heir of entail made up titles, disregarding the entail, and sold the estate, under the supposition that by the destination he was fiar. Held, (1<sup>st</sup>), That he was substitute heir of entail, and as sales were prohibited, he was not entitled to sell the estate, and sale reduced. (2<sup>d</sup>), Also held that a party who is not infest in an estate, may make a valid entail though not infest; but that the heir substituted, in completing his title under the entail, must expedite a general service, so as to carry right to the tailzie. (3<sup>d</sup>), Also, that as the purchaser could not plead ignorance of the records, where the entail was recorded, he could not plead *bona fides*, or the positive prescription. (4<sup>th</sup>), Also, that an error in the designation of the writer of the entail, appearing in the sasine as recorded, though correct in the entail itself; and the name of the procurator to whom the symbols of infestment were delivered, being different from the name of the procurator named in the other parts of the sasine, did not annul the sasine. (5<sup>th</sup>), That the entail might be recorded after the death of the entailer, at suit of a remote substitute heir of entail. (6<sup>th</sup>), That the sasine taken by the party succeeding to the entailer uninfeft, may validly contain the prohibitions, and irritant and resolute clauses, although the anterior precept under which infestment was taken did not contain these.

Sir James Livingstone married Mary, Countess Dowager of Callender, and, by the marriage contract, he settled his estate of West Quarter on the Countess for life, and the heirs to be procreated by the marriage in fee; whom failing, to the Countess in heritage for ever, and to be disposed of at her pleasure.

Sir James predeceased, without issue of the marriage, and there being no procuratory of resignation, or precept of sasine, the Countess was compelled, in order to make up her title, to bring an action against Lady Newton, his niece, and heir at law, for making up titles, and conveying the estate of West Quarter pursuant to the contract. Accordingly, in obedience to the decree obtained, Lady Newton was served heir to her uncle, and was infest in the lands on a precept of clare from the Duchess of Hamilton, the superior, where-

upon, with consent of her husband, she conveyed the estate of West Quarter to the Countess, her heirs and assignees. 1765.

No infestment ever followed on this conveyance, and the Countess, who afterwards married the Earl of Findlater, did, with his consent, execute an entail, in the following terms : Mar. 8, 1705. *LORD NAPIER v. LIVINGSTONE.*

" To and in favour of us, the said Mary, Countess of Findlater, and the said James Earl of Findlater, our said husband, and longest liver of us two, in liferent and conjunct fee, and for the said Earl, his liferent use allenarly, " and to James Livingstone of Bedlormie, and the heirs male lawfully to be procreated of his body, which failing, " to his other heirs male whatsoever; which failing, to such person or persons, as we the said Mary, Countess of Findlater, shall nominate and appoint," &c. declaring " that it shall not be in the power of the said James Livingstone, nor any others of the heirs and members of tailzie, named or to be named, by us the said Countess, to sell, annoy, nailzie, wadset, or dispone the foresaid lands above mentioned, nor any part or portion thereof, nor to contract debts," which if they do, " the said James Livingstone and the other heirs of entail above written, shall *ipso facto* omit, lose, and tyne the right of succession to the said lands."

The Countess died in about a year thereafter, without issue of the marriage, whereupon James Livingstone, the next heir of entail, succeeded, and made up titles by applying to the superior, (the Duchess of Hamilton), and obtaining a charter, confirming Lady Newton's disposition to the Countess, and the Countess' entail, but no general service was expedited by him. Infestment followed thereon, but it was not recorded. Yet he procured himself infest on the precept in Lady Newton's disposition of the estate to the Countess ; and this infestment, although the precept in the disposition did not warrant it, contained all the prohibitory, irritant, and resolutive clauses in the entail. The entail itself was not recorded until after the death of the entailer ; and then only, on the prayer of the father of the infant heirs of entail, next entitled to succeed.

James Livingstone, on attaining majority, got involved in debt, and thereafter became insolvent, and was obliged to sell the estate to one Drummond a writer, who, it was alleged, sold it a few years thereafter for double the price, to Lord Napier the appellant.

On James Livingstone's death without issue, the right of succession to the entailed estate devolved on the respon-

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dent, the deceased's brother, who brought the present action of reduction, to set aside the sale, on the ground, 1st, That **LORD NAPIER** the lands of West Quarter were never properly vested in **"."** **LIVINGSTONE.** James Livingstone; he was only an *heir substitute*, named by the deed of entail, and ought to have been served and cognosced as heir called to the succession, and, consequently, his resignation into the hands of the superior, and charter thereon, were void, without the service. But supposing no service necessary, yet James Livingstone could only take under the limitations of the entail, which contained express prohibitions against selling and contracting debt; 2d, If James Livingstone's title, by the resignation on Lady Newton's procuratory without service was void, so were those deriving right from him. In defence to the action, it was stated, that James Livingstone, by the conception of the entail, was joint fiar with the Countess, and not a substitute, and so entitled to sell. It was further objected, that the recorded infestment following the entail, bore that the entail in the testing clause, was "written by John Dick, servant to Alexander **" ander Hamilton**, writer to the signet, in place of Alexander **" Cuninghame,"** writer to the signet, the proper name in the entail. The name of the procurator, to whom the symbols of infestment are delivered, is written John Burn in the record, whereas, it is John Bryce in the sasine proceeding on the entail, and, therefore, he insisted that the infestment 1706 was void and null. The sasine itself was lost, and, consequently, it could not be known whether the error was in the record, or in the sasine itself. But a proving of the tenor having been brought, the case was discussed, of these

Nov. 25, and dates, and interlocutors pronounced almost in similar terms

Dec. 10, 1761. to that ultimately pronounced, as follows:—"Repel the ob-

Mar. 3, 1762 "jections to James Livingstone's base infestment 1706, that

Aug. 4, & 11, 1762 "the designation of the writer of the Countess of Callen-

"der's tailzie is different in the sasine from what it is in the

"tailzie, and that the name of the procurator, to whom the

"symbols of infestment were delivered, is different from the

"name of the procurator who, in the other parts of the sasine,

"is marked as compearing for James Livingstone; but find

"that a general service was necessary to James Livingstone,

"in order to carry right to the Countess' tailzie, and there-

"fore find, that James Livingstone's base infestment 1706,

"and the charter from the Duke of Hamilton's commis-

"sioners, in the year 1728, and infestment following thereon,

"proceeding without the said general service, were ineffec-

"tual, and did not vest the property of the lands of West 1765.  
 "Quarter in him; and, *separatim*, in respect it is not proved  
 "that the charter of confirmation by the Duchess of Hamil- LORD NAPIER  
 "ton, in the year 1706, was ever delivered to James Living- v.  
 "stone, and that it appears still to have remained in the LIVINGSTONE.  
 "hands of the doers for the family of Hamilton, find that  
 "the said charter of confirmation can have no effect in this  
 "cause: Find that the Countess of Callender had power to  
 "make a tailzie of the lands of West Quarter, in terms of  
 "the Act of Parliament 1685; and that the tailzie made by  
 "her, of date 8th March 1705, having been recorded in the  
 "register of tailzies, on the application of Alexander Living-  
 "stone of Bedlormie, an heir substitute in the tailzie, was  
 "effectual against singular successors; and, therefore, find,  
 "that the disposition by James Livingstone to Wm. Drum-  
 "mond, and also the disposition by him to Lord Napier,  
 "were not only void, as proceeding *a non habente*, but were  
 "also granted contrary to the prohibitions and clauses irri-  
 "tant in the Countess of Callender's tailzie: And repelled  
 "the defence of the positive prescription pled (pleaded) for  
 "Lord Napier, and also the other defence pled for him, that  
 "William Drummond had purchased *bona fide* from James  
 "Livingstone, and reduced the said dispositions granted by  
 "James Livingstone to William Drummond, and by William  
 "Drummond to Lord Napier, with the infestments follow-  
 "ing thereon, and decerned."

It was afterwards discovered that infestment had followed Mar. 2, 1763.  
 on the charter of confirmation of 3d May 1706, and on petition against the above interlocutor, in so far as it finds the said charter an undelivered document, the Lords altered so far as to find that the same was delivered, and found that thereby James Livingstone's sasine in the said lands, 1706, was sufficiently confirmed, and they repelled the objections to the said sasine, that the prohibitive, irritant, and resolutive clauses in the entail were engrossed in said sasine, they not appearing in the precept of Lady Newton's disposition, upon which precept it proceeded.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—When the appellant purchased West Quarter, he had not the least idea or suspicion that the property was held under a strict entail. No limitations were contained in the titles of James Livingstone, who had possessed for twenty-two years, or in those of Drummond, who had possessed for six years before the ap-

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pellant purchased. The entail act 1685 expressly declares, "that if the prohibitory and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall bruik or enjoy the tailzied estate, they shall not militate against creditors, or other singular successors." This clause ought sufficiently to protect the appellant, who is a *bona fide* purchaser, and was sufficient of itself to prevent him from looking further into the old title; and, upon the faith of this title being good and unexceptionable, he has entered into improvements of a large and most extensive nature. But, *separatim*, as the Countess of Callender had only a personal right, and had never completed her title to the estate by charter and infestment, she had no power to execute a valid entail of the same, the feudal right remaining with the person last infest. But, supposing she had a power to entail, it was not in the power of Alexander Livingstone, acting as guardian merely of his son James, to call for the registration of that entail after the death of the entainer. This act, even if valid in law, was otherwise void, in so far as it operated to the prejudice of an infant, and he was entitled to be restored against such act when he came of age. Accordingly he completed his titles, and sold the lands without regard to the entail. But the prohibitions cannot bind him, because independently, and supposing the entail good, these only operated in favour of the *heirs male of his body*, but as there were none such, and as the next series of heirs, (*his own nearest lawful heirs and assignees whatsoever*,) could not plead the privileges of the entail, they not being heirs of entail, but heirs whatsoever, the fitters did and could not operate in their favour, and therefore the estate was free in James Livingstone. Besides, the sasine 1706 is null, because of the discrepancy between the record and the entail itself, in the names of the party, and the procurator who delivered the symbols of infestment.

*Pleaded for the Respondent.*—The appellant has no real interest in the question; because, as he purchased from Drummond with absolute warranty, under that warrandice he is entitled to complete indemnification. He is not in *pessima fide* in pleading the rights of a *bona fide* purchaser; because, if he had resorted, like all purchasers, to the record, he must have seen that the estate was held under strict entail, expressly prohibiting the sale thereof. That entail was recorded, and when it was made by the Countess of Callender, it was enough that she was unlimited proprietor

in fee of the estate, and though she had not been infest, yet this did not prevent her from executing an entail of the estate, or assigning the procuratory in the disposition whereon no infestment had followed. The entail was no doubt recorded long after her death, but Alexander Livingstone was a substitute, and had an obvious interest to insist in its being recorded. The critical and trifling objections taken to the sasine 1706 have been justly repelled, these two inaccuracies in the record being correctly written in different parts of the same instrument, which thereby corrects itself.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed the House, and the interlocutors affirmed.

For Appellant, *Al. Wedderburn, William Johnstone.*

For Respondents, *Tho. Miller, C. Yorke, Al. Forrester.*

Lord Monboddo, one of the Judges, says:—" This day, 2d Nov. 1761, the Lords determined several points concerning entails. And, in the first place, it was determined unanimously, dissent. tantum Kames, that a man having only a personal right to lands, may, nevertheless, make an entail in terms of the act 1685 ; and, upon searching the records, it was found that a great number of estates, and those the greatest in the kingdom, had been entailed in that way. The second point was, Whether an entail could be recorded after the death of the maker ? and it carried that it could ; dissent Alemore and Justice Clerk ; and, at the distance of a remoter substitute, upon a summary application, as had been decided before in the case of the tailzie of Dunsinnan, March 1757, and in two or three other cases.

" There was a third point determined concerning an objection to a sasine, which was, that in beginning of the sasine, John Bryce is named as the procurator for the person who was to be infest, but the symbols are delivered to John Burn, who is there called the foresaid procurator. The objection was overruled by a considerable majority, dissent President ; and the Lords were of opinion that it was only a mistake in the name, and that the reference to the procurator first named, fixed the person. Some of the Lords too observed, that the principal sasine was here lost, and that the tenor was made up from the copy in the register, where that mistake might have been made in transcribing."

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**ALEXANDER CUNNINGHAM, W.S.** - - - *Appellant;*  
**CUNNINGHAM** **THOMAS KINNEAR,** Insurance Broker in Edin-  
 v. **KINNEAR, &c.** burgh, **ALEXANDER BROWN and SON, Mer-** } *Respondents.*  
**CHANTS, and WILLIAM HUME, Merchant Up-** }  
**holsterer in Edinburgh,** - - - }

House of Lords, 27th March 1765.

**PARTNERSHIP—JOINT ADVENTURE—PRÆPOSITUS NEGOTIIS.**—Where goods were purchased on individual account; and thereafter an interest purchased therein by another, as part of a cargo shipped for foreign trade; where also there was no contract, and no previous reputed partnership, anterior to the purchase of the goods shipped: Circumstances in which held, there was an existing copartnery, and that the deceased partner, in purchasing the goods, in ordering the insurances, and in receiving the returns, acted as *præpositus negotiis* of the company, and bound the other partners.

Michael Ancrum, merchant in Edinburgh, engaged in a foreign trade from Leith to Madeira and Jamaica, which was entirely distinct, and no way connected with another partnership, in which he was chiefly concerned. Residing in Edinburgh, he there purchased the commodities and goods suitable for the Madeira markets, and shipped them off in one vessel.

The appellant Cunningham, Andrew Ronaldson, Thomas Murray, and others, joined him in this private trade, and agreed to take from him particular shares of the goods thus shipped to Madeira and Jamaica.

The appellant took one-third of one cargo, and a fourth of another cargo, shipped to these places in 1760; and one half of two cargoes, shipped for the same place, in 1762.

The goods shipped in 1760 were under the following invoices: (1.) "Invoice of goods shipt by Michael Ancrum for "Madeira and Jamaica on board the ship Edinburgh, Tho- "mas Murray, master, on the joint account and risque of "Alexander Cunningham, Esq., and Michael Ancrum and "Thomas Murray, consigned to the latter." (2.) "Invoice "of goods shipped by Michael Ancrum for Kingston in "Jamaica, on board the Edinburgh, Thomas Murray, mas- "ter, on the joint account and risque of Alexander Cun- "ningham and Andrew Ronaldson, Esquires, and Michael "Ancrum, and Mr. John M'Lean of Kingston, and to him "consigned."

For the goods shipped in 1762, the invoice sets forth: "Invoice of goods shipped by Michael Ancrum for Madeira, "on board the ship Edinburgh, James Hamilton, master, on

"the joint account and risque of Alexander Cunningham, 1765.  
 " Esq., and the said Michael Ancrum, and to the said James  
 " Hamilton consigned." The other, which had reference to CUNNINGHAM  
 goods sent to Jamaica, was in precisely the same terms, on- KINNEAR, &c.  
 ly that the goods were consigned to a different party—John  
 and Archibald M'Leans of Kingston.

These last invoices were made out on 27th Feb. 1762, after the goods were shipped, but the vessel waited 14 days longer, to receive some guns from Newcastle. Ancrum delayed signing the invoices: In the meantime, he had fallen ill, and by the time the vessel was ready to sail (13th March) he was unable to sign them, whereupon the appellant signed these "for Michael Ancrum and self." Ancrum died on the 17th of March, having first conveyed his whole estate to the appellant and other trustees, for the payment of his debts, &c.

The appellant was appointed by his co-trustees to manage Ancrum's affairs; and, in order to do this prudently, he ordered on the 25th March such an additional insurance on the ship and cargo as, with £3000 already insured, should entitle the insured to recover £2360 on the goods, and £1400 on the ship, free of all deduction.

The goods shipped had been bought on credit by Ancrum, and, unwilling to abide the result of the adventure, or recovery of Ancrum's estate, Kinnear, for himself, and as trustee for the vendors of these goods, raised an action against the appellant and his co-trustees, and also against Daniel M'Lean of Jamaica, and Andrew Ronaldson, Esq., as partners, joint traders, or adventurers, with the said Michael Ancrum, for payment of £1200. Another action was brought for goods bought upon the same grounds by John Weir, merchant in Edinburgh, for payment of £667. 18s. 7d. It was agreed that one action should settle the question as to both, and that a decision against the appellant would be conclusive as to all the defenders. They were both laid on the basis that the appellant was a partner in trade with Ancrum, and that Ancrum merely purchased on credit for the company. The pursuers therefore insisted, that there was a proper partnership between Ancrum and the appellant for carrying on a joint trade, and consequently each partner was liable *in solidum*. That though there were no formal articles of agreement entered into for a certain term, as is usual in partnership, yet the legal consequences and liability were the same, where the goods were furnished to a joint

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concern, and the appellant a member of, and a party taking benefit from that joint trade. Yet the partnership was proved: 1<sup>st</sup>, By the invoices above referred to; 2<sup>d</sup>, Letters written by Ancrum and the appellant to their correspondents in Jamaica, in which the appellant appeared to identify himself as a party interested; and in particular, a letter addressed to "Messrs. Cunningham and Ancrum," from Jamaica, advising them of certain goods to be sent out next voyage, as most suitable for the Jamaica market, which agreed with the invoice of goods sent to Jamaica in 1762; 3<sup>d</sup>, An order by Ancrum to Weir, which, it was alleged, desired him to furnish the goods for behoof of Cunningham and Ancrum; 4<sup>th</sup>. Two letters written by Ancrum to the appellant, when in London, stating that he was about being laid in prison for Kinnear's insurances, and that the appellant's share thereof was £380. In addition to these articles of evidence, it was pleaded that Ancrum was *præpositus negotiis*. In answer, it was contended as Ancrum alone made the purchases, and effected the insurances, and as the respondents dealt with him, and upon his own credit, they had no claim against the appellant. That his interest was purchased from Ancrum after the latter had bought the goods from the vendors on his own account; that anterior to this there was no partnership or joint adventure; that he contracted with him merely for a share of the cargo, without any previous partnership with him, or any dealing with the respondents whatever.

July 27, 1763. The Lord Ordinary pronounced this interlocutor: "Having considered the several proceedings in this cause, and the mutual memorials and writings produced, finds it fully instructed, that the defender, Alexander Cunningham, was concerned as a partner in the different adventures which gave rise to the question in debate: Finds it also instructed, that the furnishings of the goods, and the different insurances libelled upon by the pursuer, were made and brought to the account or use of the company, wherein Mr. Cunningham was a partner: Finds it also instructed, that Michael Ancrum, now deceased, in purchasing the goods, in ordering the insurances, and in receiving the returns of the goods sent abroad, and recovering the insurances, acted as *præpositus negotiis* of the said companies, and not in his own name only; and that the engagements he came under, for behoof of the said companies, affect the companies as a copartnery debt, and Mr. Cunningham

"as a partner." On representations and answers, his Lordship adhered; and upon reclaiming petition to the whole Court and answers, the Court pronounced this interlocutor: *CUNNINGHAM v. KINNEAR, &c.*  
 "The Lords having advised this petition, with the answers thereto; they refuse the desire of the petition, and ad- Nov. 16, and  
 "here to the Lord Ordinary's interlocutors; find the peti- Dec. 1, 1763.  
 "tioner liable in expenses of process, of which ordain an Jan. 21, 1764,  
 "account to be given in," &c. and Feb. 16, 1764.

An appeal was taken of these interlocutors to the House of Lords.

*Pleaded for the Appellant:*—There is no averment by the respondent that Ancrum and the appellant ever entered into articles of partnership, or were joint partners in trade, anterior to the purchase by Ancrum of these goods from the respondents, nor has he proved that they were known and reputed as such, at any time, or concerned as partners in the trading cargoes in question; and all that is set forth is, a partnership inferred by presumption with regard to the two cargoes, and hence it is contended, that those who furnished the goods did so, on the credit of Cunningham, as well as Ancrum, who bought them; but this is contrary to fact, because all the evidence established is, that the respondents dealt with Ancrum alone, in the sale of these goods, which is confirmed by the state of Ancrum's own books, where they are set forth as a purchase on his own individual account: That the appellant only dealt with Ancrum himself, as owner of the whole, without regard to those with whom Ancrum had contracted: That these were mere joint adventures, which are distinct from partnership. In partnership each is liable for the whole; but in these temporary adventures, it is established by the best authorities, that he who purchases the goods, is he who stands liable for the whole to the third party, the associates being bound only to each other. Further, that the plea of *præpositus negotiis* is inapplicable to adventure, and even in a case of proper partnership, no one can act as such, without a special commission or pro-curation existing at the time of the purchase; but that no such commission existed is evident, by the fact, that the respondents never knew, till after Ancrum's death, that the appellant was in any way connected with the joint trade, and as, at the time of the purchase, they did not know of such connection, so they cannot be presumed to have relied on his credit, or given the goods to Ancrum as *præpositus negotiis* for others.

1766. *Pleaded for the Respondents.*—By the law of Scotland, ~~WISHART, &c.~~ all partners in a private trading society, are liable conjunctly and severally for furnishings made to the trade of that ~~v.~~ ~~MAGISTRATES~~ ciety. It is not essential to the constitution of such a society, ~~OF EDINBURGH.~~ that a contract in form should be executed between the partners, or a firm, or social name assumed by them; but the society may be established to the above effect, *rebus ipsis et factis* by the consent of the parties, proved by their accounts and transactions. A society may also be established *de certa re aut negotio* concerning a particular voyage, or adventure, as well as for a greater length of time, or more extensive trade. Society is defined, a contract for the communication of profit and loss. Persons may in some cases be called not improperly joint traders, without being *socii* or copartners. But where there is a communication of profit and loss, and of the property of the goods *pro indiviso*, a proper society is created. In the present case, there was clear evidence that it was a society, and not joint adventure, which connected the appellant with Ancrum in the two cargoes in question, and the latter having dealt with the respondent as *præpositus negotiis* of the concern, was liable for the furnishings ordered by him.

After hearing counsel, it was

Ordered and adjudged that the appeals be dismissed this House, and the interlocutors therein complained of be hereby affirmed; and that the appellant do pay to the respondents £80 costs on these two appeals.

For Appellant, *Fl. Newton, Al. Forrester.*

For Respondents, *Tho. Miller, C. Yorke.*

*Note.—This case is not reported in Court of Session.*

GEORGE WISHART, D.D., and all the other  
Ministers of the Gospel in Edinburgh, } *Appellants;*  
THE MAGISTRATES of Edinburgh, - - - *Respondents.*

House of Lords, 17th February 1766.

JURISDICTION OF COURT OF TEINDS—STIPEND.—Held the Court of Teinds has no jurisdiction to augment the stipend of ministers out of any other funds than the tithes of the parish, where the minister serves the cure, and, therefore, that they had no jurisdiction to augment the stipends of the ministers within the city of Edin-

burgh, although there were several funds set apart and devoted to the support of the Clergy under the control of the Magistrates.

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THIS was an action raised by the ministers of Edinburgh, before the Court of Session, as Commissioners of Teinds, for augmentation of stipend, in the following circumstances. Between the years 1648 and 1653, the stipends of the ministers of Edinburgh had been augmented to £172. 4s. 5d. but thereafter, the affairs of the corporation becoming embarrassed during the Usurpation, they consented to restrict this sum to £138. 17s. 9½d., under a proviso that their doing so should not prejudice their successors, or their own right to resume their claim to the higher sum. Matters continued in this situation, until, finding themselves no longer able to subsist on so small a stipend, from the great rise in the price of provisions, they raised the present action before the Court of Session, as a Court and Commission of Teinds, against the magistrates of Edinburgh, setting forth, that the expense of living had greatly increased, and that there was a sufficiency of funds devoted to the support of the clergy, from several sources, over which the corporation had control, more than adequate to afford an augmentation to all, and therefore concluding that the said Lords should modify and settle a suitable stipend to the ministers within the city of Edinburgh, and their successors in office, out of the funds allocated for payment thereof. In defence, the respondents did not appear to dispute the expediency and justice of the demand for augmentation; but stated this preliminary defence: That the Commission of Teinds, and Court of Session, as come in place of that court, has only jurisdiction in modifying and augmenting the stipends to ministers *out of the teinds of the parish where they serve the cure*; and actions of this nature, at the instance of ministers of royal burghs, that are stipendary, and where there is no landward parish, are unprecedented and incept. It was answered, that there was a sufficiency of funds for augmentation in the several funds set apart for these purposes; as, 1st, From tithes of landward parishes in the neighbourhood; 2d, From the ancient revenues of the church, such as lands pertaining to all chaplinaries, alterages, and other prebendaries; 3d, From the annuity of six per cent. on rent of houses within the town; 4th, From impost tax of eight pennies on French wine imported; 5th, From impost of one merk Scots on each ton of goods imported by strangers into Edinburgh;

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6th, Rents of seats in churches; 7th, Donations made for the purpose of providing stipend to ministers; 8th, Impost on ale and beer. From all these sources there was realized a yearly revenue of £4000, whereas the stipend paid to the whole ministers only amounted to £2222. 4s. 3d. per annum. The question on the merits was therefore beyond dispute: But in regard to the preliminary objection to the jurisdiction, the Court had right, as a Court of Teinds, to augment stipend in the circumstances of this case, because it was clear that they were the proper judges to try and award such stipend by the act 1707. To these judges, as a commission, or court of Teinds, the legislature had delegated its own power. That the words of the act were *general*, giving full power to grant *augmentations of ministers' stipends*, and though some of the temporary acts referred to, in the act 1707, did mention teinds or tithes, as the great national fund for the provision of the clergy, yet neither these temporary commissions, nor the act 1707, declare that the ministers were to be provided from teinds *only*. That, accordingly, the Commissioners, as a court of Teinds, had always granted provision to ministers out of other funds besides the tithes, particularly out of feu-duties; out of the ordinary revenues of burghs, as in the case of Town of Haddington in 1650; also in the case of Dysart in 1723; and in the case of the Town of Inverness in 1754. Out of collieries and salt-works, as in the case of Dysart in 1723. These proved, beyond all doubt, that the jurisdiction of this court was not confined to teinds only; but that the court had power to assign stipends to ministers from other funds.

Jan. 19, 1763.

The Lords, of this date, "repelled the objections offered "to the competency of the court, and ordained parties to "be ready to debate on the merits." But memorials being thereafter given in on the whole cause, embracing also the objection to the court's jurisdiction, and containing a careful review of the several grants and acts of parliament establishing the funds for the provision of ministers, the Lords,

Dec. 12, 1764. of this date, "found, that they had no jurisdiction to grant "an augmentation to the ministers of Edinburgh out of the "funds now condescended on by them."

It was against this interlocutor that the present appeal was brought before the House of Lords.

*Pleaded for the Appellants.*—It is not disputed in the case, that the ministers, in consequence of the increased expense of living, are in justice entitled to an augmentation

of stipend. It is also not denied, that the Court has jurisdiction in so far as to entitle them to an augmentation of stipends from the tithes. The only question thus remaining is.— Has the Court, or Commission of Teinds, jurisdiction to grant such augmentation, in the circumstances of this case? The act 1617, which is the basis of all the subsequent acts, empowers the Commissioners to assign competent livings to the clergy, and mentions the *whole fruits belonging to the patrimony of the church* as a fund for their provision. The subsequent acts mention teinds, without specifying any other fund; but this does not prevent the Commissioners, who are a committee of parliament, invested with the most ample powers in these respects, to grant provisions or augmentations out of any other funds, especially out of those set apart for the support of the clergy within burgh. This view is supported by the practice of the Court of Session, in the instances of cases above quoted, for the last century past.

*Pleaded for the Respondents.*—The Lords of Session, by the act 1707, c. 9, were appointed judges of the augmentation of ministers' stipend, "conform to the rules laid down" and powers granted by the 19 Act Parliament 1633; 23 "and 30 Acts Parliament 1690; and 24 Act Parliament "1693," and as by those acts stipends can only be augmented out of the tithes of parishes where the stipends are sought to be augmented, the Court of Teinds has therefore no power of augmenting the appellants' stipends out of any other fund, nor out of those set forth by the appellants. The jurisdiction conferred is limited to tithes out of land; and in all such new jurisdictions, the power conferred must be so interpreted, as not to go beyond the jurisdiction conferred. It is therefore clear, that none of the grants above set forth, vesting the funds enumerated in the corporation, come under the power of the Court of Session, as a commission or court of Teinds.—they having no control over any fund except the tithes of the parish; but the funds under these several grants, seem to fall under the management of the magistrates, as a corporation, against whom, action may lie at common law, in the ordinary way, as to the proper appropriation of these funds. Nor do the words *fruits, rents, and patrimony*, used in the first commission 1617, nor the exception in the act 23d Parliament 1690, of *such feu-farms, or quit rents, as were then part of the ministers' stipend, or whereof the ministers had been in possession for ten years,* warrant the appellants' demand to modify, or augment the ministers' stipend, out of any other fund than the tithes of

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the *parish*; and therefore the present augmentation being sought to augment the stipend of ministers within burgh, the Court of Teinds had no jurisdiction over the funds of such a corporation.

**After hearing counsel, it was**

Ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For Appellants, *C. Yorke, Al. Wedderburn.*

For Respondents, *Tho. Miller, Al. Forrester.*

*Note.*—This case is reported in Morison's Dictionary, p. 7476; and Fac. Coll. p. 244. It is there stated that the objection to the jurisdiction of the Court of Teinds was *repelled*, without observing that, on further discussion, this judgment was altered: and the objection to the jurisdiction *sustained* by the Court; and no notice is taken of the affirmance of this last judgment in the House of Lords. *Vide* Ersk. b. i. tit. 5. § 23, who founds correctly on the latter judgment, and lays down the law in conformity with it.

ALEXANDER BURNET, Charge des Affaires at the Court of Berlin, - - { *Appellant;*

**SIR THOMAS BURNET, Bart.** - - *Respondent.*

**House of Lords, 30th April 1766.**

## SUCCESSION—ADJUDICATIONS—DESTINATION—HEIRS WHATEVER

—CONFUSIO.—Adjudications were purchased up by the heir succeeding to an estate specially destined to “*heirs male*.” He took the conveyances of these adjudications to himself and his “heirs whatsoever.” Held, that when the estate descended to an heir male, different from the heir of line, or heir whatsoever, that the heirs of line were not entitled to succeed as such, to the adjudications ; and that these, as collateral and accessory rights, had accrued to the family estate, and were not now a separated estate, but extinguished *confusione* in the person of the heir male.

In the year 1700 Sir Thomas Burnet settled his estate of Lees by a tailzie, upon Alexander, his eldest son, and the “heirs male of his body, whom failing, to his other heirs “male,” reserving a power to himself to alter the tailzie, and to charge the estate at pleasure.

His eldest son being married to Miss Helen Burnet, only

daughter and heiress of Robert Burnet of Cawton, by their marriage contract, the lady's father conveyed his estate of Cawton to his daughter; and Sir Thomas Burnett, on his son's behalf, became bound, that if he should exercise the powers reserved to himself, of altering or burdening the estate entailed on his son, so as to defeat and disappoint his right and succession to the same, "to recompense and pay " to the said Alexander Burnett, his heirs and assigns, the "sum of £40,000 Scots (£3333. 6s. 8d.), at the first term "after his using any such redemption, or doing any fact or "deed to the exclusion of the said Alexander Burnett, and "the heirs male of his body, from his succession to his said "estate."

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On Sir Thomas Burnett's death, Alexander, his eldest son, now Sir Alexander, succeeded; and an agreement, or postnuptial contract, was entered into with his mother, and wife and self, having in view to diminish the burdens on the estate, in so far as the provisions affecting these were concerned; he became bound "to provide and settle his whole lands, pertaining to him at the time of his lady's death, upon himself for life, and their eldest son, and the heir's male of his body, whom failing, to the other heirs male procreate of the marriage; whom failing, to his other heirs male whatsoever in fee."

At this time the exact state of his father's affairs (Sir Thomas) were unknown; but these, being afterwards made known, turned out to be bankrupt. Sir Alexander was advised to repudiate, and enter heir *cum beneficio inventarii*.

Having thus been deprived of the estate entailed on him by his father, he took measures to secure himself in payment of the £40,000 Scots, provided to be paid to him in his marriage contract, on the event that had now happened, namely, of being deprived of the estate by the debts and incumbrances of his father. He assigned this obligation to a trustee, who brought an action upon it, obtained decree, and led adjudication against the estate upon this and other debts, which he had bought up. This adjudication, together with other two, were afterwards conveyed, together with the lands adjudged, to Sir Alexander Burnett, "his heirs and assignees whatsoever."

In an action brought in 1721, it had been decided by the Court that Sir Alexander Burnett, the son of the entailed, was not bound by the entail, as it might, in consequence of the reserved powers, be altered and cancelled at

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any time ; and as it could not be found at his death, it was to be presumed cancelled. But the estate otherwise stood by the investitures thereof destined to *heirs male*.

Sir Alexander continued to possess the estate till his death in Dec. 1758, gradually paying off, by good management, the debts on the estate, and never altering the securities, or conveyances of the debts and adjudications, which were taken to his heirs of line, not to heirs male. On his death, he left an only son, Robert, and two daughters. The son, Sir Robert, in order to connect himself with the whole legal title then in his father, namely, that by *cum beneficio inventarii*, as well as that by purchase, under the adjudications, served himself in the two characters of heir male and heir of line, and was infest. He died, of this date, without issue, being succeeded by his cousin, the respondent, as heir male.

The present question was then raised by the appellant, the son of Helen Burnett, Sir Alexander Burnett's eldest daughter, as one of the heirs portioners and heirs of line of Sir Alexander, in so far as the debts secured by adjudications, which bore to be in favour of his heirs whatsoever, were concerned. He therefore raised action concluding for payment of one half of the debts secured by the adjudications, contending that as these bore expressly to be conveyed "to Sir Alexander Burnett, and *his heirs whatsoever*," one half descended to him, as his heir whatsoever and of line, as a distinct and separate estate from the land estate, over which they were burdened. In defence, it was pleaded, 1<sup>st</sup>, That the words "heirs whatsoever," in the conveyance of the adjudications, must be understood to denote the heirs male succeeding in the estate; and that the adjudications were extinguished *confusione* in the person of Sir Alexander and his son, who made up titles as heirs male, and thereby became debtors and creditors in the several debts; 2<sup>d</sup>, That Sir Alexander, by taking the conveyances of the adjudications to himself and his heirs whatsoever, did not intend thereby to create a separate estate, descendible to his heirs of line, for this practically would be, to perpetuate the incumbrances on the estate; but, as collateral rights, these adjudications accrued to the family estate, and were extinguished *confusione* in the person of the heir succeeding, or acquiring the same.

July 7, 1763. The Lord Ordinary, of this date, pronounced this interlocutor: "Found that the three adjudications, with the

" grounds of debt libelled on, conveyed to the deceased Sir Alexander Burnett, his heirs and assignees whatsoever, " are not now a separate estate belonging to the pursuer, " and Robert Aberdeen, as heirs of line to the said Sir Alexander, but that the same are now descended, and properly vested in the defender, as heir male and of investiture " of the said lands contained in said adjudications."

On representation and reclaiming petition, the Court "una- Dec. 24, 1764. nimously sustained the defences and adhered." An appeal was taken to the House of Lords against these interlocutors.

*Pleaded for the Appellant.*—In the law of Scotland the words "heirs whatsoever," have a clear determined signification; they denote the heirs of line, or heirs at law, in contradistinction to heirs male, and carry every subject of succession falling under that title, as distinct from the succession taken up as heir male. This is further strengthened by the evidence of intention, from the terms in which these rights are conceived, and also in the origin of the £40,000 Scots bond, which was given to the lady, and was secured for the behoof of the issue of the marriage, whereas, if it had been intended to go to the heir male, it would have been so expressed, in accordance with the settlement of the estates then made. Therefore Sir Alexander, in settling it on heirs whatsoever, intended to secure the £40,000 Scots on the issue of the marriage, in preference to his collateral heirs male, who could have no title in law or equity to Lady Burnett's own estate; to the exclusion of her own issue.

*Pleaded for the Respondent.*—That the words "heirs whatsoever," had no fixed or determined meaning, and were descriptive of all kinds of heirs, and applicable, according to circumstances, and the apparent intention of parties, to heirs of line, heirs male, heirs of conquest, of tailzie, or of provision; and where the settlements of an estate are devised to heirs of any particular character, the acquisition of collateral rights, or incumbrances affecting that estate, though conceived in favour of *heirs whatsoever*, are carried as accessory, and must belong to the heir of the estate. If Sir Alexander intended to preserve the debts as a separate estate, descendible to his heirs of line, distinct from heirs male, he would have left some deed as evidence of this his intention; but the adjudications conceived in terms to him and his heirs whatsoever, are no evidence of such intention, but leave these debts to go as accessories of the estate to the heir male.

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After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors complained of be affirmed; and  
 it is farther ordered that the appellant do pay to the  
 respondent £80 costs, in respect of said appeal.

For Appellant, *Thomas Miller, Fl. Norton.*  
 For Respondent, *C. Yorke, Al. Wedderburn.*

*Note.*—This case is not reported, but a subsequent case between  
 the same parties appears reported. *Vide M. 14939; Fac. Coll. iv. p.*  
*221;* by mistake, it is stated that this last case was appealed; but  
 the judgment in the House of Lords there affixed, does not apply to  
 that case, (which was not appealed,) but to the present case, now for  
 the first time reported.

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BLAIR and Others, - - - - - *Appellants;*  
 SIR WILLIAM MONCRIEFF, Bart. - - - - - *Respondent.*

House of Lords, 5th May 1766.

CONTRAVENTION OF MARRIAGE CONTRACT—SERVICE—MINORITY—  
 PASSIVE TITLE—RATIFICATION.—1. Held that the heir of the marriage  
 contract is entitled to reduce a deed executed in fraud of the marriage  
 contract, without expediting a general service; 2. Held such heir is  
 entitled to set aside a general service expedited in his name in mino-  
 rity, to his hurt and prejudice, in so far as it made him universally  
 liable for his father's debts; 3. Also held, that as his ancestor  
 died in apparencey in regard to Moncrieff estate, he was entitled to  
 pass him over and serve heir to his grandfather, without being lia-  
 ble for the debts; and as to the other provision, or estate of  
 £5555. 11s. 1d., and 100,000 merks, he was not liable *passive*,  
 he not having taken benefit from that estate, and that a sum of  
 £2500 received to ratify these did not make him liable *passive*.

Sir Thomas Moncrieff having no issue, became a party to  
 his nephew's marriage contract, and thereby conveyed his  
 estates of Moncrieff and Fordell to him *and the heirs male of*  
*that marriage.* Provision was made by a jointure to the  
 lady; and the nephew was strictly prohibited from execut-  
 ing any voluntary deed, to the prejudice of the heirs male  
 of the marriage. Sir Thomas also bound himself to secure  
 him and his said *heirs male of the marriage* in the sum of  
 £5555. 11s. 5d., payable the Whitsunday after his death.

On Sir Thomas' death the nephew succeeded: he sold the estate of Fordell for £5555. 11s. 1d.; and invested the price in the purchase of lands, called Boghall, Craigie, and Magdalans, and placed the remainder on heritable security, taking these conveyances to himself and his *heirs and assignees whatsoever*.

Of this marriage there were two sons, and three daughters, and Sir Thomas (the nephew) having granted an additional jointure, and made large additions to his daughters, and conveyed the new purchases of Boghall, Craigie and Magdalans to his second son, David, the question was raised on his death, by his son, Sir Thomas, the third, that those conveyances were in fraud and contravention of the marriage contract; and that the money with which these lands were purchased, was the proceeds of the sale of Fordell, which was settled on the *heirs male of the marriage*.

With the view of supporting his reduction of these conveyances, Sir Thomas, the third, served himself heir of provision in general, under the marriage contract. But he died during the dependence of the suit, and before he had established in himself, by special service, a feudal title to the estate of Moncrieff, wherein his father died infeft.

The respondent succeeded him while in pupillarity; and while a pupil, he was served heir of provision and in general to his deceased father.

After obtaining majority, it turned out that his father's debts were considerable. He also found that his general service, expedite by his guardians while a pupil, made him universally liable; and he therefore revoked that general service, and followed up this, by bringing the present action of reduction of it, as expedite to his hurt and prejudice while in pupillarity. The appellants, as creditors interested, appeared to maintain the service, and the heir's liability. He contended it was also to his hurt, because Sir Thomas Moncrieff (the third) having died in apparencey with reference to Moncrieff, the respondent might have taken up that estate, under the marriage settlement of 1701, and thus passed by, without representing his father, and, therefore, that the general service was not only hurtful but inept and unnecessary.

The Lord Ordinary found the pursuer had right to challenge the deeds done in contravention of the marriage contract, without service: and therefore found the service expedite during his minority inept and unnecessary, and that he is not liable under the same to payment of his father's debts.

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BLAIR, &c. On reclaiming petition the Court adhered, and remitted to the Lord Ordinary to ascertain how far he had taken benefit by said service to his father.

v. MONCRIEFF. Dec. 8. 1759. Whereupon the appellant contended, that Sir William having got £2500 upon a transaction for confirming and ratifying the deeds executed in favour of Sir Thomas, the second's younger children, he was liable *passive*.

Sir William answered, that his father having died in a state of apparencey *quoad* the lands of Moncrieff, he took no estate from him; and that the £2500 received from his uncle David could not be considered as part of his father's estate, the whole having been given by Sir Thomas the second to his younger children, being no more than a suitable provision for them.

Aug. 5, 1760. The Lord Ordinary found "that the pursuer's (respondent's) succession is confined to the estate of Moncrieff, " nor pretends to take any benefit by the two provisions " contained in his grandfather's contract of marriage, viz. " the provision of the estate of Fordell, and the provision of " 100,000 merks (£5555. 11s. 1d.) by Sir Thomas the first " to the pursuer's grandfather, and the heirs male of the " marriage; therefore finds the pursuer is not liable *passive* " to his father's creditors upon account of these articles."

On advising a reclaiming petition, the Court pronounced Dec. 16, 1761. this interlocutor:—"The Lords find, that it is averred

" for Sir William Moncrieff, and not denied by the procurators for the petitioners, that all the subjects which belonged to Sir Thomas Moncrieff, the respondent's grandfather, " at his death, other than the estate of Moncrieff, even including the estate which he had made over to his second " son, Mr. David Moncrieff, was no more than sufficient to " pay the said Sir Thomas' debts, and a rational provision " to his younger children, they adhere to the Lord Ordinary's interlocutor, and refuse the desire of this petition."

Feb. 23. 1762. On second petition the Court adhered.

Against these interlocutors the creditors brought the present appeal to the House of Lords, bringing up for decision the whole case.

*Pleaded for the Appellants.*—By the law of Scotland, there is no transmission of heritable rights from the dead to the living, except by service, which must be special where the ancestor is infest, but general, where there is only a personal title. Sir Thomas Moncrieff the third, either by his general service, or in his own right as creditor, under

the marriage articles, had complete right in his person to the provisions, though with respect to the estate of Moncrieff, he died in apprency, having only in him a personal right, which was affectable by his creditors. But the respondent has no ground for saying that he can sustain any damage from his service, as heir to his father, such as to entitle him to set aside that service on the head of minority and lesion. The real object of the suit is to enable him to take the estate of Moncrieff as heir to his grandfather, thus passing by his own father, in order to free himself from payment of his just and lawful debts. Besides, he has served himself heir in general to his father, which is a complete right to the £5555. 11s. 1d. provision, and to the other 100,000 merks, the price of the lands of Fordell, in which his father's right was complete; and under this service, which the respondent now seeks to set aside, he transacted with his uncle David, by which, for a sum of £2000, he agreed to ratify the deeds which were executed in contravention of the marriage contract.

*Pleaded for the Respondent.*—A general service as heir, in the law of Scotland, transfers all heritable rights *not completed by infestment* at the time of the ancestor's death; but where the ancestor is infest, a general service is inept and ineffectual; the estate in that case being only taken up on special service. There is also this important difference, that the heir by general service becomes universally liable for his ancestor's debts and deeds, both in his person and in his estate. The question, therefore, in the present case, was, whether the respondent was entitled to be restored against a general service as heir, taken out in his name during infancy, whereby he has been subjected to this liability? In regard to the proper estate of his father, consisting of the two provisions of £5555, it was clear that the debts against him far exceeded the value of that estate, in regard to which the respondent renounces all benefit, and it was therefore open to the appellants to attach it, if they saw cause, for their debts. The Court has reserved this power to them, and the respondent is ready to concur in every step that may be necessary for that end. Although his general service transmitted these sums, yet as creditor he had right to these without service. In regard to his own father's separate estate, in point of fact, there was none such. The barony of Moncrieff was never his, as he died in apprency. But even that estate was encumbered, and

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the respondent could only take it subject to the debts and deeds of his grandfather. These exceeded the value of the grandfather's separate estate ; and, consequently, there could be no relief left to the heir except out of that fund ; but as that belonged to the respondent in his own right, the heir, without representing his father, cannot be liable to communicate any share of it to his father's creditors. He, therefore, cannot take any benefit from this general service. All that the respondent took, as heir of the marriage, was the barony of Moncrieff ; but as the general service will not apply to or carry that estate ; and as this is only taken up by him, not as representing his father, but by serving heir in special to his grandfather, he was entitled to have the general service reduced, as expedite to his hurt and prejudice in minority.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor complained of be affirmed.

For Appellants, *F. Norton, Al. Wedderburn.*

For Respondent, *C. Yorke, Thos. Miller.*

*Note.—The first branch of this case is reported in Morison, p. 12,871, and Fac. Coll. ii. p. 361 ; the latter branch not. In this appeal the whole case was taken to the House of Lords.*

[Fac. Coll. iv. p. 207 ; M. 3287 ; Brown's Suppl.  
"Tait," p. 444.]

Mrs. PRINGLE and ROBERT ANDREWS and } *Appellants* ;  
MARK PRINGLE, - - - - - }  
JOHN PRINGLE of Crichton, - - - - - *Respondent.*

House of Lords, 29th January 1767.

**DEATHBED—FACULTY TO BURDEN—TESTAMENT.**—A party disposed his whole estate to his heir-at-law, under a reserved power or faculty to burden at any time during his life, with provisions to younger children. By a codicil bearing no date, but executed ten months before his death, he altered this disposition so as to diminish the fund for the heir ; and granted also an heritable bond of provision for £1000, in terms of his reserved power to burden, nine days before his death : Held that these deeds were reducible on the head of deathbed ; but reversed in the House of Lords.

The late Mark Pringle was twice married. By his first

wife the respondent was his eldest son, and heir-at-law to the estate of Crichton. By his second wife he had three sons, the appellants—Mrs. Pringle, the other appellant, being their mother.

During his life he conveyed his estate of Crichton, together with all his moveable means and estate, in favour of himself in liferent, and his eldest son, his heirs and assignees whatsoever, in fee, under burden of certain provisions to his daughters, &c. And “reserving always to me myself “alone, at any time in my lifetime, without consent of the “said John Pringle and his foresaids, to burden and affect “the said lands and others by heritable bonds or otherwise, “with such debts, gifts, and provisions as I shall think fit.”

Of this date, 1758, he executed a will, and thereafter a codicil in 1760, altering this disposition in two respects, and conveying personal funds, which affected the heir materially, by diminishing the fund out of which the debts due by him were payable. He also, in virtue of his reserved powers, granted an heritable bond of provision to May 25, 1761. Mark Pringle his other son. Nine days thereafter he died. And the codicil having no date, the present reduction was raised by John Pringle of Crichton, to set aside not only the heritable bond of provision on deathbed, but also the above codicil, as a deed which, having no date, must be presumed in law to have been executed on deathbed, on the ground that the testator could not on deathbed dispose of his personal estate to the prejudice of his heir-at-law, and so deprive him of that fund against which he had a right of relief, if called on to pay execrury debts. In defence, the appellant stated that the codicil was executed ten months before the time of his death, and was not reducible on the head of deathbed. That the heritable bond was executed in virtue of a reserved power and faculty to burden, “at any time in his life,” and to such deeds the law of deathbed did not apply; and, finally, that the pursuer had accepted of the settlement, which inferred his consent to all its clauses, and consequently barred the reduction.

The Court of Session “sustained the reasons of reduction “of the bond for £1000 sterling, as being granted on deathbed, and also of the codicil in question, as being a deed “of a testamentary nature, and decern.” \*

\* Lord Kames, one of the judges, says, Dec. p. 306:—“This was a nice case. And the first doubt that occurred, was, whether a reserved power to burden at any time in the grantor's lifetime, includes the time

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Against this interlocutor an appeal was taken to the House of Lords.

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*Forbes v. Forbes, ante.* At any time during life, the law of deathbed did not apply.

The respondent, therefore, cannot challenge the exercise of this faculty, otherwise there could be no use of such reserved power, as it might on all occasions be defeated, and younger children deprived thereby of their provisions. Besides, the heir-at-law here, taking the estate under a particular disposition or singular title, granted in his favour, must take it under the burden in the conditions of that settlement; and the obligation falling under the faculty reserved and exercised must be binding on him, and so cannot challenge his own obligation; and, by accepting and taking under that disposition, there is an implicit consent to the deed. At all events, there is no foundation for setting aside the codicil, on the ground of its being of a testamentary nature, because that is the very ground upon which such a deed, which conveys no land or real estate, is unexceptionable. A testamentary deed conveying moveables is not subject to the law of deathbed. And there is no ground whatever for supposing that it will affect the heir in the indirect way alluded to, by creating a diminution of the fund out of which the testator's debts fall to be paid.

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when one is on deathbed? The words, strictly taken, include this time; but it is far from being clear that the parties intended to include it. It was observed that the natural import of such a disposition to an eldest son is only to save a SERVICE, and cannot be so construed as to create a power in the grantor, either to alien or burden his estate on deathbed; a power that no wise man would chuse to have, considering the arts it lays him open to in his last moments. And if his deathbed deed be left unsupported by the heir's consent, his privilege to reduce is undisputable; for his acceptance of the deed as donee does not cancel his character as heir.

"In the next place, supposing the heir had consented in express terms, the question is, Whether such consent can bar the reduction? The doubt is, that if such consent be binding, the law of deathbed is at an end. For an eldest son, to whom a disposition is offered in the foregoing terms, dares not refuse to accept, which would draw upon him his father's indignation. The bond was reduced as granted on deathbed. The Judges did not separate the two points; but it was the general opinion that the son's consent, supposing it to have related to deathbed, could not bar him from challenging the deathbed deed."

*Pledged for the Respondent.*—The power and faculty reserved by the settlement in the present case, cannot give validity to deeds which are uncontestedly void by the common law, in competition with the heir-at-law. The respondent, notwithstanding the disposition, is entitled to take the estate as heir-at-law, without regard to the deed, which he never accepted of. It is further established by many precedents, that such reserved faculties cannot take off the objection of deathbed competent to the heir-at-law; though strangers, whose only title is in virtue of such special settlements, are bound by these reserved faculties. That Forbes' case was different from the present, for it was a case of marriage contract, in which the reserved power was to burden even on deathbed. This power was contained in a marriage contract, which preferred the heir male to the grantor's own daughters, who were the nearest heirs of line, and who could otherwise have taken the estate. The heir male succeeded as a stranger, and therefore it was justly found that deathbed did not apply. The faculty, therefore, in this case can have no effect, unless executed by the grantor at least sixty days before his death.

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After hearing counsel, the Lord Chancellor (Camden) said :—

“ The bond of provision in favour of the children, I consider established against the *eldest son* (heir-at-law), being executed pursuant to a power reserved in deed of disposition 1748, and codicil 1758. This disposition is accepted by the eldest son, on the faith of which, he received the whole he had to receive before infestment; and having done so, there was an implied consent on his part to the deed, such as precluded him, as heir-at-law, from reducing the heritable bond of provision on deathbed.”

It was ordered and adjudged, that so much of the interlocutor of the 28th February 1765, as sustains the reasons of reduction of the heritable bond for £1000 sterling, granted by Mark Pringle deceased, to Mark Pringle his youngest son, as being granted on death-bed, as also of the first codicil in question, subjoined to the last will of the said deceased Mark Pringle, as being a deed of a testamentary nature, be, and the same is hereby reversed.

For the Appellant, *J. Montgomery, F. Norton.*

For the Respondent, *C. Yorke, Al. Wedderburn,*

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ROBERT PRINGLE of Clifton, - - - Appellant;  
DUKE of ROXBURGH, and MR. M'DOUGALL, } Respondents.  
his Grace's Lessee of Caverton Mill,

House of Lords, 2d Feb. 1767.

## SERVITUDE OF AQUÆDUCTUS—PART AND PERTINENT—POSSESSION.—

Circumstances in which found, that a party had a right to the run of water, or a servitude of aqueduct, through a neighbour's lands, without any express grant, but as part and pertinent of a mill; and was entitled to access to do all acts to keep it in repair; and had good right to question the acts of the proprietor, through whose lands it flowed, in so far as these tended to injure or diminish the flow of water to his mill.

The Duke of Roxburgh stood infeft, on charters from the Crown, of very ancient dates, in the lands and mill of Caverton, with *parts* and *pertinents*; and when the Duke's ancestors got grants of this mill from the Crown, with parts and pertinents, the aqueducts necessary for the service of the mill, the Duke alleged, must have been comprised within those grants.

The mill of Caverton yielded his Grace a considerable rent, and he alleged that it had been supplied from time immemorial with water, by an aqueduct taken from the river Kail, upwards of a mile above Caverton mill, where, by a bulwark or cauld, raised upon Mr. Nisbet of Dirleton's land, a sufficient quantity of water was forced into the *aqueduct*, and thence conveyed, partly through Mr. Nisbet's land and partly through Mr. Pringle's (appellant's) land, to Caverton mill. The Caverton mill depended entirely upon this supply of water, for the service of the mill, and it was scarcely sufficient in dry seasons for this purpose. The aqueduct had been thus possessed and enjoyed by the Duke and his ancestors, for time out of mind.

The appellant was owner of the mill of Linton, which, he averred, was originally supplied with water by a natural current from Linton lake, situated within his own property; but this water in time proving insufficient for the use of his mill, the appellant's ancestors made the aqueduct in question, by means of a bulwark, or cauld across the river Kail, in order to force a sufficient supply of water through the adjacent lands of Mr. Nisbet of Dirleton to his own mill of Linton,

which supply of water, after passing the appellant's lands, entered those of the Duke of Roxburgh, a little above Caverton mill, and served that mill.

In consequence of certain operations resorted to by Mr. Pringle, which tended in their nature to diminish the flow of water, so as to stop entirely the respondent's mill, and to increase the flow by means of sluices to his own mill, the Duke, along with the lessee of his mill, raised the present action of declarator to have it found, that the Duke had a right to the said water for the use of his mill of Caverton; or at least, a right of servitude; and that the sluices and bulwarks erected by the defender (appellant) to diminish the flow of water ought to be removed, or that it should be declared that the respondent lessee should have liberty to open and make use of said sluices at his pleasure, so that his mill may be sufficiently served with water. A proof was allowed of the facts. Upon consideration of which, and after hearing counsel, the Lords of Session, of this date, pronounced this interlocutor, "The Lords having advised the state of the process, testimonies of witnesses adduced, writs produced, and heard parties procurators thereon, they find, (1<sup>mo</sup>), That the Duke of Roxburgh has right to the run of water, from the cauld upon the water of Kail below Grubbet Mill, through the defender's (appellant's) grounds to Linton mill, and from thence to his mill of Caverton, for the service of the said mill, and that he has a servitude upon the defender's lands for maintaining his right to the said run of water. (2<sup>d</sup>), Find that the defender is entitled to keep up and use the two sluices, erected upon the said run of water, below the said cauld, in order to prevent the water thereby issuing, from overflowing his low grounds, in time of high water or floods. (3<sup>d</sup>), But find that the said sluices ought not to be used, to the prejudice of the said mill of Caverton, by obstructing its being at all times supplied with a sufficiency of water, for the service of the said mill. And further find, (4<sup>th</sup>), That the Duke of Roxburgh and his tenants in the said mill of Caverton, have right to repair the foresaid cauld, upon the water of Kail below Grubbet mill, when occasion requires, as also, to cleanse and repair the foresaid mill-lead or aqueduct from Caverton mill upwards to the aforesaid cauld below Grubbet mill, and decern and declare accordingly." A reclaimining petition was presented against this interlocutor, upon consideration of which,

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with answers, the Court adhered. And the appellant now brought these judgments by appeal to the House of Lords.

*Pleaded for the Appellant.*—The question at issue in the present case was, not whether a lessee of the respondent's mill of Caverton shall enjoy the benefit of the water running from the appellant's mill, but whether he can have a right of property in the water of this rivulet running through the appellant's grounds, as to insist, that the appellant shall suffer, or allow to be admitted without control, such a quantity of water as may overflow and destroy his fields, worth 30s. per acre. The interlocutor now appealed from, gives to the respondent and lessee the command of this rivulet, and, consequently, subjects the appellant to a servitude, which, under the arbitrary management of a tenant of a mill, may become extremely injurious to the appellant's lands, by allowing the water to overflow; while, it is manifest, he has a clear right to preserve his own estate, as he has hitherto immemorially done, from such overflowings. Besides, it is in evidence, that the aqueduct in question was originally cut by his ancestors, for the supply of his mill of Linton; and that they had erected, altered, and improved the bulwark at their pleasure, and, therefore, the aqueduct and bulwark were subject to his exclusive command; and the interlocutor is therefore erroneous, in so far as it finds that the respondent has a servitude on the appellant's lands, for maintaining his right to the run of water, from the river Kail to Caverton mill, and to repair the said bulwark and aqueduct. The appellant has a clear interest to preserve the water for keeping his own mill going, and is perfectly willing that the full benefit of that water should flow freely to the respondent's mill. All that he insists in is, to be allowed to protect himself against the overflowings of his banks in high floods, and the means taken by him for this purpose, were both legitimate and necessary, and not such as injured the flow of water for the service of the respondent's mill of Caverton.

*Pleaded for the Respondents.*—It has been established by evidence, that the respondent the Duke of Roxburgh, and his ancestors, have, under grants from the Crown of the lands and mill of Caverton, been in immemorial possession of this aqueduct, and a servitude of *aquæductus* has thereby been established as part and pertinent of their mill, which is a sufficient title, without any express grant of aqueduct. It is further established by the proof, that as long as the present operations of the appellant remain, and the water is with-

drawn in the manner described, the Duke cannot procure a sufficient supply of water for the service of his mill, because these operations, in their nature, obstruct the flow of water for that purpose. And as there were strong grounds for believing that the servitude had its origin in conferring a benefit on the Caverton mill, this mill having been erected long prior to the appellant's, and the aqueduct then in existence, flowing through Nisbet's and the appellant's lands, and serving his mill, every presumption is in favour of the right of servitude, and also to a sufficient flow of water, with right to repair and cleanse the caulds and aqueducts.

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HAMILTON.**

**After hearing counsel, it was**

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed ; and it is further ordered, that the appellant do pay to the respondents £100 costs.

**For Appellant, C. Yorke, Al. Wedderburn.**

**For Respondents, R. Macintosh, Alexander Wight.**

**Note.—Not reported in Court of Session Reports.**

[M. 5253.]

Mrs. EUPHAM HAMILTON, Widow of CHARLES  
HAMILTON, Esq., and BETHIA and CHARLOTTE } *Appellants;*  
HAMILTON, their Daughters, - }  
ARCHIBALD HAMILTON, Esq. of Rosehall *Respondent.*

**House of Lords, 5th April 1767.**

**HEIR AND EXECUTOR—APPARENCY—RENTS.**—Held, reversing the judgment of the Court of Session, that the executors, and not the heir of a party who died in possession of an estate on apparency, was entitled to the arrears of rents unuplifted at her death.

The heir to the estate of Rosehall died in apprency, after possession of the estate for some years. She had left arrears of rent in the hands of the tenants, unuplifted by her at the time of her death. In a competition between the heir to the estate and her executors, it was objected to by the heir, that these arrears of rents did not pass to her executors, as she had died uninfeft and in apprency, while the estate

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remained in *haereditate jacente* of her predecessor, to whom she had made up a title. He was therefore entitled to succeed to the estate, as well as to the arrears of rents unuplifted in the tenant's hands, as an accessory part of the estate. To this, it was answered, that Miss Hamilton's apparencty arose from the respondent disputing her right to succeed to the estates, which she was found entitled to. That, besides, an heir apparent was entitled, before infestment, to the rents and profits of the estate, upon which she has entered into possession.

Jan. 14, 1761. The Court of Session preferred the heir.

Against this judgment an appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed ; and it is hereby declared and adjudged, that Mrs. Eupham Hamilton, the executrix of Miss Hamilton, the last apparent heir, is preferable to Mr. Archibald Hamilton the heir, to the rents falling due during the apparencty, and remaining unuplifted ; and it is hereby further ordered, that the cause be remitted to the Court of Session in Scotland, to proceed therein accordingly.

For the Appellant, *Ja. Montgomery, C. Yorke.*

For the Respondent, *H. Dundas, F. Norton.*

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ALEXANDER LYALL, Younger of Garden,  
GEORGE SKENE and WILLIAM MILNE,

*Appellant ;*  
*Respondents.*

House of Lords, 9th Feb. 1768.

**UNION—DISPENSING CLAUSE—INFESTMENT.**—Objections were stat-ed to a sasine, on the ground that it was not taken on the several tenements of lands—these, although originally united by a clause of union, being now discontiguous, and the union dissolved by a sale of part: Held, in the House of Lords, that the usage of grant-ing dispensation clauses, allowing sasine to be taken on a part for the whole, was material, if established in this case, but appeal dis-missed, in consequence of no evidence of the usage being adduced.

The appellant was enrolled as a freeholder in the county of Forfar, in virtue of a Crown charter of the lands of Pet-airlie, Guildie, and others, granted to Lord Panmure, and

assigned by him to the appellant, on the assigned precept in which he was infest. 1768.

The respondents, under the election act 16 Geo. II., petitioned the Court of Session against this enrolment, upon the allegation that the sasine which followed on this charter was void and null, as he had not taken the infestment on the several tenements included in his conveyance, although they lay discontiguous, but had only taken it at one part for the whole, by the symbol of earth and stone. To this it was answered by the appellant, that the lands were not discontiguous, but were united into one by a clause of union, and even although it were in point of fact true, that they were discontiguous, yet there was in his charter a dispensing clause, which sufficiently warranted the manner in which the infestment had been taken. The dispensing clause was in these terms:—“ Quod unica sasina per dictum Willielmum Comitem Panmure ejusque prædict. (that is, hæredes et assignati) super aliqua parte fund. dict. terrarum, nunc et omni tempore futuro per deliberationem terræ et lapidis fundi earundum, absque aliquo alio symbolo, sufficiens erit pro integris terris, baroniis, molendinis, decimis, punctionibus, at usque supra script. earundem parte, non obstan. quod discontigue jacent.”

The respondents admitted that such dispensing clauses might be established by usage, and were effectual so long as the whole lands granted by the charter remained united in the same person; but whenever this union was dissolved by the sale of part, the dispensation clause came to an end, and all subsequent infestments must be taken on each part as a separate tenement, according to law. The Court were prepared to give judgment, when the appellant petitioned the Court for further time, alleging the usage of granting such dispensing clauses, and craving time to search for instances of that usage, but the Court refused the prayer of Jan. 14, 1768. the petition as to the usage.

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellant.*—The appellant's titles, on the face of them, vest in him the lands, under which he claims to be enrolled. They are conveyed by a charter to Lord Panmure from the crown, and the appellant is Lord Panmure's assignee. It contains a dispensation, that infestment taken by delivery of earth and stone, upon any part, shall be good for the whole. These lands are conveyed, and the charter; with the unexecuted precept of sasine, assigned to

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the appellant, under which he has been infest, by delivering of earth and stone upon the grounds of these very lands, and this infestment has been taken conform to the warrant which authorized it. This union of the lands, and this dispensing clause, must mean something consistent with itself, and also consistent with its warrant, and therefore was sufficient for taking an effectual sasine in conformity therewith; and having taken infestment on a part for the whole, it was not necessary to go to every part of the discontiguous lands, and there pass infestment. The lands conveyed, and the charter assigned, stand good for a part as well as for the whole. The assignment of a part is as good as the assignment of the whole, the charter being equally good as a warrant of infestment in either case.

*Pleaded for the Respondents.*—This appeal is merely got up for the purpose of delay. The appellant had plenty of time to search for instances of the usage among the records of Court, if he had chosen to exert himself in so doing, and the nature of the case calls for a summary disposal. Even if usage could be adduced, it could not sanction errors which go to render null the sasine which has been taken; but it would be improper, in this preliminary discussion, to go into the merits of the objection itself, as the Court of Session have not yet decided on that point.

After hearing counsel, it was

Ordered and adjudged that the usage may be very material upon the question, in this cause; but that the appellant ought to have been prepared, or shewn a satisfactory reason why he could not be prepared, to lay instances of the usage before the Court. Ordered and adjudged that the appeal be dismissed, and that the appellant do pay to the respondents £30 costs.

For the Appellant, *Ja. Montgomery, Al. Forrester.*

For the Respondents, *C. Yorke, Al. Wedderburn.*

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[M. 8792.]

DAVID OGILVIE, Esq. - - - Appellant;  
 SKENE and HUNTER, - - - Respondents.

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House of Lords, 4th March 1768.

**INFESTMENT—DISPENSATION CLAUSE.**—Held, reversing the judgment of the Court of Session, that where parts of lands are conveyed by a party, whose charter contains a dispensation clause authorizing infestment to be taken on a part for the whole, that the benefit of this dispensation clause is not lost to the parts alienated, when the conveyance is merely for life, to revert then to the grantee, and that the infestment taken on part was good for the whole.

DAVID OGILVIE was enrolled at the Michaelmas head court 1767, as a freeholder in the county of Forfar, upon the following titles: 1st, A charter under the Great Seal to William, Earl Panmure, of the lands, amongst others, of Auchnevis, otherwise Auchmull, and others, dated 6th August 1765; 2d, A conveyance of these lands, 3d September following, from the earl to Mr. Ogilvie for life, reserving the fee to himself, and also of the above charter and precept of sasine therein contained; 3d, Instrument of sasine following upon the conveyance and charter to Mr. Ogilvie, dated 19th September, and registered 4th October 1765.

Messrs. George Skene and Robert Hunter, two of the freeholders, petitioned the Court of Session against the enrolment of Mr. Ogilvie, alleging that the lands lay discontiguous, and his sasine was void and null, as he had not taken infestment upon the several different tenements included in his conveyance, but had only taken it at one part for the whole, by the symbols of earth and stone. The appellant in answer, denied that the lands lay discontiguous; and insisted, that even though they did, yet by the dispensing clause in Earl Panmure's charter, this mode of infestment was expressly authorized.

The dispensing clause was in the following words:

“Quod unica sasina per dictum Gulielmum comitem Pan-  
 “mure ejusque prædict. super aliqua parte fund. dict. ter-  
 “rarum nunc et omni tempore futuro per deliberationem  
 “terræ et lapidis fundi earundem, absque ullo alio symbolo,  
 “sufficiens erit pro integris terris, baroniis, molendinis, deci-

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"mis, piscationibus, at usque supra script. cum pertinen. *vel*  
 "quavis earundem parte non obstan. quod discontigue ja-  
 "cent."

In reply, the respondents admitted that such dispensing clauses were established by usage, and were effectual so long as the *whole* lands granted by the charter continued united in the same person, but whenever the union was dissolved by alienation of part, the dispensation clause was at an end.

Jan. 19, 1768. The Court sustained the objections to the validity of the sasine.

Against this interlocutor the present appeal was brought.

*Plead for the Appellant.*—The appellant is assignee of the Earl of Panmure, whose charter contains the dispensation clause above quoted, which is conceived to the earl, his *heirs* and *assigns*. As his assignee, he is entitled by the charter to take infestment upon any part of the lands, which shall be good for the whole, or for any part. The respondents' distinction between an assignment of the whole lands, and an assignment of part only, has no foundation in the charter, but is expressly contrary to the words of it. Besides, the argument assumes what is not the case here, namely, that Earl Panmure has conveyed from him the fee of part of the lands. Had he done so, then the argument might have applied, that having sold part, the union was thereby dissolved, and the privilege of the dispensing clause at an end, with reference to the parts so conveyed. But, unfortunately for this argument, the conveyance to the appellant is for life only, and the fee is expressly reserved to himself, and made to revert back to the Earl of Panmure at L. 2, Dieg. 7, his death. Craig lays it down "per usus fructus constitu-  
 § 19. "tionem licet de domino superiore tenendi, sasina etiam  
 "subsecuta, unio tamen non dissolvitur." From which it is clear, in the present case, that where the conveyance is merely a life estate, though to be holden of the crown, the union is not thereby dissolved, and consequently the dispensing clause is left entire. Here the fee is reserved to Earl Panmure, and therefore the property cannot be said to be disjoined, or the union dissolved. But, moreover, this is not to be viewed as an erection of lands by crown charter into a union. It is only a charter granted by the crown, containing a clause of dispensation, authorizing sasine to be taken by one symbol on any part of the lands for the whole, which is a right the crown is entitled to grant; and, therefore, the respondents' argument, founded on a supposed

union, expressly created in a charter, does not apply, and falls to the ground.

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*Pleaded for the Respondents.*—The proposition is indisputable, and the appellant must admit it, that every parcel of land lying discontiguous, requires a separate infestment, ~~HAMILTON, &c.~~ unless, either by a charter of union, or by a clause of dispensation, this is rendered unnecessary. It is equally clear, that taking infestment upon each separate tenement, can only be dispensed with, by the express grant of the sovereign, either by erecting separate tenements into a barony, by an express clause of union; or by a clause of dispensation. Here there seems to have been at one time a barony, but it is equally obvious, that subsequently the lands, of which this barony consisted, were broken up; and it is clear law, that the moment these were disjoined the union was dissolved, with respect to the part alienated. The respondents, therefore, contend, that the lands in question having been sold and disjoined, have lost the benefit of the union, or dispensation clause, contained in Lord Panmure's charter. And it makes no difference that the appellant, in this instance, holds only a right for his life, the estate, after his death, reverting to Earl Panmure, because the result is quite the same, where his right is absolute and irrevocable during his life.

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After hearing counsel, it was  
Ordered and adjudged that the interlocutor complained  
of be reversed.

For Appellant, *J. Montgomery, Al. Forrester.*

For Respondents, *C. Yorke, Al. Wedderburn.*

ARCHIBALD DOUGLAS	-	-	-	Appellant;
DUKE OF HAMILTON, &c.	-	-	-	Respondents.

House of Lords, 27th February 1769.

**FILIATION—PROOF—ONUS PROBANDI.**—Circumstances in which held, that children born in France, of a certain marriage, were the lawful children begotten of that marriage—and that the appellant, having acquired his *status* as such—and having been served and retoured the lawful son and heir of the parties, that he was entitled to be protected in that *status* until the contrary was proved; Ques. Whether the *onus probandi* of proving the reverse, lay on those who impugned his birth.

The late Duke of Douglas, and Lady Jane Douglas, his

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sister, were the only children of the late Marquis of Douglas, who died during their infancy.

Lady Jane Douglas was a lady of considerable beauty—of graceful manners, and of high accomplishments. Her figure was tall and handsome. Her complexion was pale, yet not wearing the darker features of her race. Besides possessing all those qualities which inspire admiration, or elicit veneration and respect, she was a great presumptive heiress; and belonged to a house and family the most ancient and noble in Europe.

In early life she had been betrothed to the then Duke of Buccleugh; but, on some offence taken by the Lady, which ended in a duel between her brother and the Duke, the affair was finally broken off. She was consequently late of entering into marriage life; which she did, by marrying Colonel Sir John Stewart, Bart. in August 1746.

Lady Jane, on her marriage with Colonel Stewart, was then 48 years of age, and the Colonel 57. The marriage was private, the parties retiring immediately to France, accompanied by Mrs. Hewit, a lady's companion, and two female servants. The reason of keeping the marriage private at the time, was the fear of displeasing her brother, who had been in the meantime created Duke of Douglas; and the question in this great cause was,—Whether the appellant, Archibald Douglas, was the lawful issue of that marriage; or a mere fictitious child, bought from a glass-blower?

After the death of the Duke of Douglas, without issue, the large estates of Douglas devolved on Lady Jane Douglas' son; and the question as to his birth and status arose in a competition for the estates, wherein he claimed to succeed as heir, duly served and retoured to the deceased; while the Duke of Hamilton brought a reduction of the service, on the ground that the appellant was not the son of Lady Jane Douglas; and, consequently, that he, as next heir-male, had best right to succeed. While Lord Douglas Hamilton and Sir Hew Dalrymple, claimed as heirs of line of the Duke of Douglas.

The averments of the appellant in regard to his parentage were:—That Lady Jane Douglas, after leaving England, became pregnant in France,—that she was obliged to declare her marriage there; but as her English friends in France—people of great rank and fashion,—were numerous, to whom the marriage had not been communicated, a little privacy was necessary, and adopted on their part. After moving about from place to place, and lodging to lodging, she gave

birth to twin sons in Paris, of whom the appellant is the eldest. That Sholto, the youngest, being delicate, was left to nurse under the care of "the man-midwife," (accoucheur). That Lady Jane, having removed to Rheims, became again pregnant, and miscarried. That they remained here until November 1749, when they returned to Paris, brought their youngest child Sholto from the nurse, prepared to return to England, and arrived in London in Dec. 1749. Here the youngest child was publicly baptized by a clergyman, in presence of the Countess of Wigton and others; and both parents acknowledged their two sons as their children, and these children were presented universally to their friends, and invariably treated by them as such. Lady Jane and her husband were all along living in great poverty and distress, the Duke of Douglas having cast her off, on the supposition that she was attempting to impose upon his family false children. Her youngest son died of fever in 1753. She soon thereafter died herself, in an obscure and wretched lodging in Edinburgh; and thereafter her son, the present appellant, was taken under the protection of Lady Shaw, an intimate friend.

She is never separated from her children until death. While living, the parents acknowledge them to the world, and to their friends, as their lawful offspring, and with their last breath they die asserting the integrity of their surviving child.

The Duke of Douglas executed a settlement of his whole real estate upon the Duke of Hamilton, failing heirs of his own body. Though very old, he afterwards married, and the Duchess, his wife, leaning to the side of humanity, exerted her influence with the Duke, in favour of the appellant, so as to produce a favourable opinion as to his birth, and hence arose the quarrel, separation, and reconciliation, between her and the Duke—the many conflicting deeds which followed, &c., one of which was, a postnuptial contract of marriage, whereby, failing issue male of his own body, he disposes the dukedom of Douglas to *his own nearest heirs and assignees whatsoever*, which was followed by a settlement by entail, executed shortly before his death, in favour of the appellant, conceived in terms to "heirs whatsoever of his father." Thus every thing in the way of succession depended on proof that the appellant was the son of Lady Jane Douglas.

But as he had already proved himself by service before a jury, that he was the lawful son of Lady Jane Douglas, a question of law necessarily mixed itself up with this fact,—

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namely, that being in possession of his lawful *status of filiation*, the *onus probandi* to prove the contrary lay with the pursuer (respondent). He therefore contended, that as he had been served heir of the Marquis of Douglas, as son to Lady Jane, by the verdict of a jury, he was thereby in full possession of his status of filiation, and entitled to hold that character, until the respondent proved the absolute impossibility of his being the son of Lady Jane. On the other hand, it was maintained by the respondent, that the question in this reduction stood exactly in the same situation as it did before the verdict of the jury in the service. That verdict and service were now impugned; and the *onus* lay on the appellant, to adduce evidence of his being the lawful son of Lady Jane, and so heir entitled to succeed to the Dukedom of Douglas, precisely as if he were proceeding to serve himself heir of new; and that, at all events, the Court were not tied down in this case, to any precise rules of evidence. The Court, acting on this idea, allowed a proof of all facts and circumstances, which either party might hold material. Accordingly, this proof was gone into.

*Appellant's Proof.\**—The appellant had, first, a strong presumptive proof. 1st, He was already in possession of his *status of filiation*, which was proved by various articles of evidence, as, first, by the service itself, which was sufficient evidence of status. But, second, independently of this, the appellant in fact possessed the status of Lady Jane's son. This possession of status was indicated by the parents calling the children born their sons,—treating and rearing them with all the usual marks of regard and tenderness—holding them forth to the world as such, and also, by the holy and religious ceremony of baptism, which proceeds on the most solemn faith that the child is their own. All these were not only done by Lady Jane and her husband; but proved in the present case. The children are baptized—are tenderly reared, and watched over with all the uncommon affection and solicitude of the mother. 3d, Habit and repute was quite general, that the appellant was Lady Jane's son—this habit and repute being further strengthened by family likeness, proved to be strong. Such was the legal presumptive proof.

But there was other proof equally conclusive and convincing.—Lady Jane's capacity to bear children, although

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\* An abstract of the proof taken from two large vols. of 1065 pages each.

married at 48, and, although, as medical men believe, both capacity and successful safe deliveries after this age are rare, was proved beyond all doubt. It is proved that they were married in Edinburgh, in presence of Mrs. Hewitt, on 4th August 1746. A few days thereafter they departed for the continent, attended by Mrs. Hewit, a lady companion; and by Isabel Walker and Effy Caw, two maid-servants. They arrive in Harwich in the end of August same year,—proceed thence to Holland, and arrive at the Hague in the beginning of September, where they reside until the end of December, and remove to Utrecht, where they reside until April 1747. They then departed from Utrecht to Aix-la-Chapelle, and took up their residence there with Madam Tewis, who let lodgings, with whom they resided until 10th August 1747, when they went to Spa. They returned to Aix-la-Chapelle in the same month, reside with Mrs. Champinois till the 14th September 1747, but afterwards went back again to Madame Tewis. She is proved, while here, to appear pregnant in the month of October,—and remains in her lodgings until the 5th January 1748; and with Mrs. Scholl, until the end of March 1748. Her pregnancy is sworn to here, about the months of October and November, by Madame Tewis and her husband, and several of the domestics, who observed its progress from month to month, gradually and successively. She endeavoured to conceal it, because, at this time, Colonel Stewart wished her marriage kept a secret; but, notwithstanding this, the nuns of the Capuchin convent, where she frequently visited, had detected it, and, on deposition, swore that it was quite observable to them. This appearance of pregnancy was also deponed to by Sir George Colquhoun, Madame Negrette, Miss Primrose, Mrs. Greig, Lady Wigton, (with whom she for a short time lived at Aix), Madame Tewis and her husband, and others. It was also proved that Lady Jane, before leaving Aix-la-Chapelle in May, caused her clothes and stays to be widened. And Mrs. Hewit deponed, that when she left this place, her belly and breasts, and particularly her breasts, were so remarkably big, that she was thought to be with twins,—that Lady Jane was naturally slender, and before had scarce any breasts: That she was delivered of two twin boys, at the house of Le Brun in Paris, on 10th July 1748, by La Marre, a man-midwife.—She is corroborated by Isabel Walker, Lady Jane's chamber-maid, as to the pregnancy, who deponed that she observed the suppression of the menses: That she had occasion fre-

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quently to see Lady Jane's naked breasts and belly. Had felt her belly. Had felt the live child move. The other servant, Effy Caw, was dead, but Walker deponed, that at this time she and Effy were ordered to make child's clothes. Further, it is proved that, by a letter written by Lord Crawford, then in Paris, to the Duke of Douglas, her brother, dated 28th April 1748, the Duke is informed of her marriage and pregnancy. Lord Crawford intimates in this letter the visible alterations in her appearance, as follows:—“ I am “ hopeful my representations will not only meet with for- “ giveness, but with also their wished-for success, in recon- “ ciling your Grace to an event all the well wishers of your “ Grace's family may have the greatest reason to rejoice at, “ as there is such visible hopes of its being attended with the “ natural consequences so much longed for, by all that are “ fond of seeing the family of Douglas multiply.”

In this letter, inclosed, was one from Lady Jane herself to her brother. And the receipt of both was sworn to by the Duchess of Douglas, who deponed, that “ she remembers “ that the Duke of Douglas told her frequently that he had “ received a letter from Aix-la-Chapelle, acquainting him “ with her marriage to Colonel Stewart; and of her being “ with child; and that, to the best of her remembrance, the “ Duke of Douglas added, that Lady Jane's letter was en- “ closed in the said letter from Lord Crawford.” Other persons are likewise by letter informed of the pregnancy. She leaves Aix-la-Chapelle in this state on 20th May,—the reasons assigned being, that the expense of living was then high there.—Other reasons were alleged, such as the want of good medical skill. It was proved by several of her letters, that at this particular juncture she had formed a resolve to go into Switzerland,—then to lie-in at Bedbour; but she, instead of following up these plans, sets out for France, and arrived at Liege, where her pregnancy is observed by several Scotch residents there,—Mrs. Hepburn and others, who de- pone to it. She left Liege on the 26th May,—staid some days at Sedan, and arrived about the 6th or 7th of June at Rheims. Mrs. Hewit depones that she was threatened with delivery or miscarriage at Sedan. Isabel Walker speaks to the same fact; but places its occurrence at Rhetel, further on in her journey. While Sir John, in a written note, places it at Rheims. On her arrival at Rheims, she is introduced to Mons. and Madame Andrieux, to whose house they go di- rect, and thence to the Inn, and sometime afterwards to Hi-

bert's lodgings. Florentine Andrieux deponed, "that he was  
"then only 19 years of age. Madame Stewart, sometime  
"after her arrival in the city, begged Madame Andrieux,  
"the deponent's mother, to cause make for her some child's  
"clothes, telling the same Madame Andrieux that she was  
"to go forthwith to Paris to lie-in. At this his mother dis-  
"covered her surprise, as she seemed not to observe it. When  
"they came back from l'aris, recollects his mother stood as  
"godmother to the baptism of Archibald, Lady Jane's eldest  
"son. Lady Jane always wore a hoop. On cross,—de-  
"pones that he did not perceive that she was with child,  
"Depones, that he never heard that his mother advised Ma-  
"dame Stewart to go and lie-in at Paris. That he never  
"heard that Madame Stewart, before her departure for Paris,  
"called any physician, surgeon, or "man-midwife," &c. There  
"was in the town of Rheims sundry physicians and surgeons  
"very skilful. Depones, that his mother died of apoplexy.  
"That he never heard that his mother had been ill, brought  
"to bed, or hurt in any of her inlyings. Depones, his fa-  
"ther died in 1763." The Abbe Hybert, the Priest at  
whose father's house Lady Jane went to lodge at Rheims,  
deponed, that on arrival in that place, they lodged with his  
father, including Mrs. Hewit and the two maid-servants,  
Isabel Walker and Effy Caw. They came in the month of  
June, and lodged about five or six weeks. He walked much  
about with Lady Jane. On observing her with child, he ob-  
served to his sisters,—" Do you know what persons  
"you have here ? They do not say they are married ; and  
"there is a mystery in this, for the lady appears to me to  
"be with child, *notablement grosse.*" He recollects, that  
while sitting with Lady Jane one day, during Colonel Stewart's  
absence, he observed to Lady Jane, " Your husband is very  
"long in returning to-day;" to which she answered, smiling,  
" Eh ! Who told you then that he was my husband ?" and  
the deponent replied, also smiling, " Your situation, ma-  
"dame ;" to which she added nothing but a smile. This  
pregnancy was not so observable, or observed at all, in her  
walks in the garden and streets, because she wore a hoop,  
but his conviction was formed by seeing her when in undress.  
When asked, on cross, " Who told you that it was not rags  
"which she had about her ?" the deponent replied, " What  
"reasons could she have had to affect to appear with child  
"before me, when she made a secret of it to my sisters and

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to the public?" Lieutenant Maclean and M'Kenzie called on her, and saw her pregnancy, and Mrs. Hewit, Isobel Walker, and Effy Caw, speak distinctly to it. When seven months gone, Isabel Walker depones "that she always undressed her and put her to bed. She and Effy Caw did not go with them to Paris, but before Lady Jane went, she and Effy were ordered to make child's clothes, and on one occasion Madame Hybert caught her engaged in the work. She hid it." Mrs. Hewit deponed, on cross, "that Lady Jane, when at Rheims, had no new clothes made, nor old ones altered, before she went to Paris."

Mrs. Hewit deponed, in the proof led in the service, that the reason why Lady Jane went to Paris, was because no proper help was to be had at Rheims, as they were told by every body; and that the two servant maids were left at Rheims for want of money to carry them along. She afterwards deponed, "That Lady Jane did at this time enquire at Mrs. Andrieux what assistance could be procured at Rheims for her delivery; and was answered, that they were as ignorant as brutes in that respect; and that she, Mrs. Andrieux, had had one child, in the birth whereof, by their unskilfulness, she had contracted a disease which rendered her incapable of having more children, and had ruined her constitution, and, therefore, she advised Lady Jane to have nothing to do with the people at Rheims on that occasion."

They accordingly departed from Rheims to Paris, and arrived in the latter city on the 4th July 1748, and put up at the hotel de Chalons, St. Martins, kept by Godefroi, and in a few days thereafter Walker received a letter from Mrs. Hewit, informing her of the birth of two sons. She exhibits and produces that letter; and Mrs. Hewit, on her part, depones, "that after remaining at the hotel de Chalons a few days, they removed to the house of Madame le Brun, in the Fauxburgh St. Germain, where Lady Jane was delivered, on the 10th July 1748, in her presence, of two male children, by La Marre, the man-midwife." Besides Mrs. Hewit's evidence as to the delivery, there was the evidence and judicial declaration of Colonel Stewart himself. La Marre was dead; but his existence as a person who practised midwifery, was established by Mr. Menager, surgeon in Paris, and Mons. Gilles, surgeon there. The former was intimately acquainted with La Marre. Had practised surgery with him for 12 years, at the Hotel Dieu. He remem-

bered of La Marre speaking to him of the case of a foreign Lady whom he was to deliver; and as, from her age, it was likely to be a difficult case, he was to assist. This was about 16 or 17 years ago. He did not assist the delivery, as he got otherwise engaged; but was told by La Marre afterwards, that he delivered her of two boys, one of whom was weakly, and at nurse, under his care. And Mr. Moreau, first surgeon of the Hotel Dieu, corroborated their testimony, in stating that La Marre and Menager were both in the Hotel Dieu together, that La Marre was a man-midwife, and that he had put to him certain questions on paper regarding a delivery, which he answered in writing. In La Marre's book mention was made of Madame le Brun. And by the evidence of M. de Beauville, advocate, keeper of the capitulation roll in Paris, it appeared there were several persons of the name of Le Brun in different parts of Paris in the year 1748, but none in the Fauxburgh St. Germain. By the examination of La Marre's brother, he deponed that his brother practised midwifery. It appeared that Le Brun was known to La Marre.

The youngest of the two children which he delivered was born weakly, and was baptised by him, and sent out to nurse under his care, in the neighbourhood of Paris, while the eldest boy was retained and taken with them. It was next proved, that Le Brun's house being infested with bugs, she was obliged, soon after her delivery, to be removed to the house of Michelle, a l'Hotel D'Anjou, Street Serpente, where the people observed her anxiety and affection for the appellant. Michelle depones to a gentleman coming to look at her rooms. He asked "if there were any bugs in the house, to which the deponent answered, that nobody had complained of them. He returned in the evening, and took the rooms, bringing two ladies with him."—"Depones, That when that gentleman and these ladies entered to the deponent's hotel, they had no child with them;" "but next day, in the evening, they "brought a child and a nurse." Blainville and Breval, two witnesses, say, that "on her arrival she was pale, and looked like one newly brought to bed." And Madame Michelle says, "she was weakly at first, but gathered strength daily." Lady Jane left her house on 3d or 4th August, was able to go to Damartine, about six leagues from Paris, and thence back to Rheims on 6th August, where her whole appearance was observed to be changed. She puts up with Madame Mayette, who depones, "that after coming to her, at this

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" time, they remained with her for 16 or 18 months, leaving " her in November or December 1749." " Before she came to her house, she perfectly well recollects of their former visit to Rheims." They then staid in Hybert's lodgings. Recollects of seeing them often. Lady Jane then walked with difficulty, and seemed to have great bulk, and the posture of a woman with child." It was a Mr. Macnamara who engaged the lodgings for Mr. and Madame Stewart, stating " that Lady Stewart was gone to Paris to lie in, and intended to occupy them on her return." " She brought Mrs. Hewit along with her, two chamber-maids, and a nurse, and a male child about six weeks old. Madame Fabre accompanied them from Paris as wet nurse to the child the length of Damartine, and was with them there for 15 days, until they got another nurse, who came on with them to Rheims. Sholto was left behind at nurse in charge of La Marre, and it was otherwise proved, that a child belonging to foreign parents, was nursed by a woman called Garnier, in the neighbourhood of Paris, who was delivered to nurse, by La Marre, who informed her that it was a twin child, and gave her money. While Madame Michael depones to " hearing of the twin child left at nurse, whose name was Sholto. She observed, that she loved this child very much, and shewed it all manner of tenderness and affection." " She never doubted, nor had reason to doubt, that Madame Stewart was the mother of these children, because she shewed a great deal of tenderness for them. She went very seldom abroad, and was almost constant in her attendance on her children." " Recollects the journey Sir John made to bring the second child from Paris. After its arrival, they remained in Rheims with her but a short time." Miss Primrose also deponed to hearing of the letters Sir John received from Paris, in regard to the health and progress of his son Sholto. These letters Sir John told her were from La Marre. And she and the other witnesses speak to the baptism of Archibald at Rheims—the Countess of Wigton standing godmother, and Lord Blantyre as godfather. These witnesses also deponed to the fact, that while staying at Rheims at this time, after coming back from Paris, that she again became pregnant. Lady Wigton, Mrs. Greigg, Mrs. Hewit, and the two servants, Isabel Walker, and Effy Caw, are quite clear on this point: and that a miscarriage was brought on by an accident in coming home from Lady Wigton's house; and Effy Caw brought to Chevalier Stewart, or Mangen the

nurse, the dead child or foetus. The nurse deponed to lifting the foetus out of the vessel, and saw it was a male child of seven or eight inches in length. Mrs. Hewitt also speaks distinctly to this miscarriage, and so does the nurse. Mrs. Hewit deponed (on cross) "that no surgeon was called ~~HAMILTON, &c.~~ in on this occasion; and that the only time when a surgeon was called in at Rheims was, when Archibald was threatened with a rupture."

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Upon receiving a remittance from England, from the Earl of Morton of £350, they paid off their debts at Rheims, and after procuring Sholto from Paris, proceeded on their journey to England with both their children. In the course of their journey they met with several friends. With Chevalier Douglas at Dunkirk, who deponed he saw their children; and declared that Sholto was weakly, but very like Lady Jane; and that Archibald was strong, and very like his father, Sir John Stewart. They arrive in England; and their likeness to their parents was proved by several witnesses. It was also proved by a host of evidence that Lady Jane and Sir John cherished the utmost fondness for the children; that they acknowledged them to the world as their children; and did on most solemn occasions, namely, on the approach of death, as persons stepping into eternity, emit declarations, confessing that they were their real and lawful children.—Lady Jane and her husband were universally believed to be above any such crime as falsifying children, and Mrs. Hewit and Effy Caw were persons of the most unblemished character and veracity.

Against this evidence, there was arrayed other evidence, which cast a veil of mystery and doubt over the whole case. It was alleged, in the first place, that the whole proof, as above set forth, amounted to nothing more than a fictitious appearance of pregnancy, assumed merely for the purpose of perpetrating the fraud, of bringing forward false children. It was proved, that when he went to the continent, Colonel Stewart passed under the name of John Douglas, and as one of Lady Jane's domestics. Lady Jane writes from Utrecht to her friend Mrs. Carse, in Edinburgh, in February 1747, in which she expressly denies her marriage. When at Aix la Chappelle she writes home to several friends in Scotland,—to Mr. Haldane, to the Right Honourable Stewart Mackenzie, and to Mr. Robertson,—for advances of money, in all of which she conceals her marriage. She writes Mrs. Carse again on 8th February 1748, and still conceals

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her marriage. She denies it in a conversation with Lady Katherine Wemyss. No appearance of pregnancy is observed at this time by Lady Wemyss or her husband, the governor, from which, it was deduced, that the appearances of pregnancy were assumed, though not assumed until the end of February 1746. It appeared too, from part of the evidence, that this was sudden and not gradual, That Lady Jane never appeared to her more intimate friends without a hoop, and her breast covered : that she concealed her marriage at Aix la Chapelle to all but the abbess and nuns of the convent. The first account given by Lady Jane to her brother, the Duke, of her marriage, was on 10th April 1748. It was proved also, that the Countess of Wigton, with her maid Mrs. Greig, and Miss Primrose, and Mr. Fullerton of Dudwick, did not come to Aix until 5th May, from which date till the 21st May, when they left for Paris, they, it was said, could have little opportunity of seeing Lady Jane's appearance. Besides, the accounts of this appearance were differently given by the Countess and Mr. Fullerton, and by Mrs. O'Callaghan, and that given by Miss Primrose and Mrs. Greig. The different pretexts assigned for leaving Aix la Chapelle are disproved. It was proved that good assistance for delivery could be had there. It was also proved, that while there no physician midwife, or man-midwife, was consulted on Lady Jane's pregnancy. In their letters to Scotland, they disguise their intention of going to Paris, by stating their resolve to pass into Switzerland, &c. : and no apparent motive is assigned for moving about, especially in Lady Jane's supposed condition and state of health. Accordingly they set out for Paris ; they arrive at Liege. Her stay here for two or three days, was marked, with this difference, that there was an effort to show off Lady Jane, instead of concealing, as previously, her bulk and size, at those places where she made a longer stay. The evidence of Chevalier Douglas, and Lambignon, and his wife, who saw her here, was founded solely on her apparent size, which belongs as much to simulate as to real pregnancy. It was also proved, that there was at Liege at that time very good assistance for delivering women, and particularly, that in this populous town there were 25 physicians and 25 surgeons, ten of whom were men-midwives ; and that there were twelve midwives in the town. She leaves Liege on the 25th May,—travels along the mountains of Ardennes, during the course of three days, and arrived at Sedan on 27th May, where they stay till 5th June, resume

their route, and travel on thence to Rheims. Arrive at Charleville. Mons. Guenet, notary at Vauremont, enters the stage coach at Charleville, and travels two days with them to Rheims. The road was rough, being cut up with ruts—the diligence was heavy, and jolted the passengers much. In Mrs. Hewit and Isobel Walker's account of this journey, in their evidence given in the service, they state that Lady Jane took so bad that they were afraid she would have been brought to bed there, or had a miscarriage. Mons. Guenet's evidence did not bear out this fact: He stated, "at first he did not know whom he had as fellow travellers; by degrees they got into conversation; they came to dine at Launoy stage; he then dined with the gentleman. Had much conversation with him then. The gentleman paid for the whole dinner, in spite of having insisted to pay his share; they set out again on their route from Launoy, and arrived at Rhetel, at Simpson's inn, in the evening." On this stage he asked the gentleman "whom he had the honour to travel with; the answer was, that his name was Stewart, and that he was a Scotsman." "He asked the deponent if he knew Mr. Andrieux, wine merchant in Rheims, to whom a friend of his had written, requesting him to procure lodgings for them at Rheims; to which the reply was in the affirmative;" adding, "that he would have the honour, on their arrival at Rheims, to conduct them to Sieur Andrieux. "They arrived at Rheims on 7th June, and accordingly "he conducted them on foot from the coach office to Mr. Andrieux, who stated that he had received the letters to procure lodgings, but had not yet succeeded, and that Colonel Stewart would require to go to an inn for a few days, until they were procured." After resting, and having a collation served of wine and biscuit, Mr. Guenet then conducted them through the streets to an inn. "Depones, that during this journey he did not "perceive that Madame Stewart was with child, because he "paid no attention to it." "That she wore a long cloak " (Fr. mante), which fell from the shoulders to the feet: "that the two chambermaids had cloaks of the same kind, "and that the lady who accompanied her had not." He visited Rheims two months after that, "learned from the two chambermaids that their master and mistress had gone to Paris, as the latter was to lie in there, at which he testified his surprise, as he had seen no signs, and heard nothing

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of that when they last met." It was next proved that the lodging they procured at Rheims was at Mrs Hiberts. That lady's daughter deponed, "That she has no remembrance of perceiving that Madame Stewart was with child : that she cannot say if she was or was not;" and that she "never learned by Mr. and Madame Stewart, nor by the lady who accompanied them, nor by the chambermaids, that Madame Stewart was with child ; but she may have been with child, although she did not observe it." She remembered of seeing the chambermaids working at childbed linen. "She asked them what it was?" whereupon Effy wrapt up her work, and said, "It is nothing ; it is nothing." When she went out she always wore a hoop ; her walks being chiefly the Great Garden, or the ramparts. She was always accompanied by her lady companion. That when they left her, she did not know that they were going to Paris. She heard after they left her father's house, that the maid servants were left behind. And sometime after, she heard that Madame Stewart had been brought to bed at Paris. This was the first time she heard that they had gone to Paris ; her brother, the Abbe Hibert, saw Madame Stewart more frequently than she did, and often accompanied her on her walks. Miss Louisa Hibert, sister to the above, also depones to the same effect :—"she did not perceive that the lady was with child ;" but recollects her brother, the Abbe, who saw her more frequently, asked her "if she did not perceive something about Lady Jane?" Depones, with her sister, that no company visited them while at their house, except Madame Andrieux. They left her lodgings without mentioning that they were going to Paris. About fourteen days after they left, she met Effy Caw, who told her that her mistress was "brought to bed at Paris of two boys. Upon which she testified her surprise ; and said to her, "since Madame was with child, and so near her inlying, why did she not remain at Rheims to lie in there ? and to that Effy replied.—That there were two English gentlemen who were to go to Paris to be witnesses of the delivery, because that was necessary, in order that the infant might be acknowledged legitimate." Also Madame Santre, dress-maker, who was called in to alter some dresses at this time at Rheims, stated that she altered several gowns into the French fashion for Lady Jane, and did not perceive her pregnancy, although she may have been in that state. Mr.

Andrieux also deponed that he did not notice that Lady Jane was with child. And Governor Maclean deponed that he frequently saw them, but neither Sir John nor any one ever told him that she was with child. He did not perceive it; he did not take any sort of notice; she always wore a very large hoop; if she was with child, it must have hid it. Saw her off in the coach for Paris along with Lieutenant Mackenzie; but they took no notice that she was with child. This was on 2d July 1748. There were plenty of good physicians, surgeons, man-midwives, and midwives in Rheims; it was proved that none such were consulted or brought into the lodging. They then leave Rheims on 2d July 1748 for Paris,—that is eight days before the birth, and travel during three days to Paris, in a machine, or coach, having no springs.—Madame Vantre and her maid were in the coach with them. They depone, that though they were packed up much together in the coach, and complaining of places, she did not see or hear, during all the journey, that Lady Jane was with child. Thinks they wore great cloaks; and another lady traveller, Madame Andry, depones, of seeing a fine, tall, pale foreign lady in the coach. She appeared to be about 38, but “did not appear to her to be with child.”—“She was of a fine shape, neither fat nor lean,” and wore “a scarlet travelling cloak.” It is also proved that she concealed from the passengers that she was the wife of Sir John Stewart, and no mention during the route of her being with child, or complaints of fatigue or heat. It is next proved that they arrive at Godefroi’s Hotel, De Chalons, in Paris, on 4th July,—the landlord having been forewarned of their coming, by a letter from Maillefers, which letter makes no allusion to Lady Jane’s situation. It is proved by the entries in Godefroi’s books, that they came there on the 4th July, and continued to have charges set down to them to the 13th July, for wine, suppers, &c. Godefroi deponed, “that he kept in his hotel the books for the police, to write “down in them those who come to lodge in his house, one “of which books is called the ‘Livre de l’Inspecteur,’ and “the other, the ‘Livre du Commissaire;’” and a book being presented to him,—“deponent knows it to be the ‘Livre “de l’Inspecteur,’” which he made use of in the year 1748. Depones, “that the article which is in these terms, 7 July 1748, “Mr. Stewart, a Scotch gentleman, and Madame his spouse, is of the handwriting of Madame Godefroi, the de-

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ponent's wife. That the deponent also kept, at same time, a book or register of expense, in which was wrote the expense of those who lodged in his house." That book is now deposited at the Tournelle. " Deponent remembers, that there came to his house in summer 1748, a gentleman who was a stranger, who told the deponent that his name was Mr. Stewart, and two stranger ladies with him,—that the gentleman told the deponent that he was from Scotland. Depones, that he did not see any accoucheur, or midwife, nor any other person, come to visit Mr. Stewart, and these two ladies, during all the time they staid in the deponent's house. Depones, that he never knew of any accoucheur or surgeon of the name of La Marre. Depones, that he was not informed by these persons, or any other, that the lady had come to Paris to be delivered, nor that she was with child. " He did not recommend them to any midwife, or to any other hotel or lodgings. He did not learn to what other house these strangers went to lodge when they left his house. That they only told him that they were going to the Fauxbourg St. Germain. Depones, that he never knew any person of the name of Le Brun, who kept a hotel or furnished lodgings, or who was mid-wife or sick-nurse." Madame Godefroi depone as to the 7th July being the date on which Mr. and Madame Stewart entered, " Depones, that she cannot affirm that this date is exactly the date of the entry of Mr. and Madame Stewart, and observes that she is equally uncertain of the exactness of the other dates, because her house, being known and unsuspected, the inspector did not come every day, but was sometimes eight days without coming." It was proved that it is only at the instant of the inspector's visit that they write down the entry. Hence the entry dated 7th July. Corroborates her husband in other respects. By a pocket book produced, kept by Lady Jane, Lady Jane had written in her own handwriting, that Archibald and Sholto were born on 10th July 1748. So that the dates of charges in Godefroi's Hotel, running up to the 13th July, gave ground to believe that the children were either born there, or that the date (10th July) of the birth was erroneous. But the appellant explained that this was accounted for by a separation being made.—The account being divided into two parts by a line,—the first part ending on the 7th July or 8th July,—and the other part commencing with 9th July, closing at the bottom with *cinq jours et demi*, (five

days and a half.) Although he had removed his lady, Sir John may have gone there to dine, or sup, during the latter part of it. Then again, various accounts were given of the house where she was said to be delivered. At first, Sir John, in his account to Mrs. Napier, when the children were born, wrote that Lady Jane was delivered in the house of Madame Michel, in Paris. Afterwards, when enquiries are made, he declares that the delivery took place in Madame Le Brun's, in the Fauxbourg St. Germain, before La Marre, a man-midwife, residing in Paris. It is proved that Madame Le Brun is searched for, but is not to be found.—If she had existed, the procedure adopted by Mr. Stewart in Paris, the Tournelle Criminell, would have traced her out. This process having been prefaced by the publication of a Monitoire in 1763, dispersed throughout all France, conceived in terms to attract attention, and supposed the crime of "stealing or procuring false children, already proved against Sir John Stewart and Mrs. Hewit." It was published by the Archbishop of Paris, described Lady Jane and Sir John Stewart's person, dress, and appearance; and all persons were enjoined, under pain of excommunication, to reveal to the parish Curées whatever they knew concerning the facts therein contained. Neither from this source,—nor from the Police books,—nor from the capitation roll, where all persons who kept lodgings were registered, could a Madame Le Brun be found living in July 1748, in the Fauxbourg St. Germain. There were other Le Bruns; but none corresponded with the place. It was therefore contended she was an ideal person. La Marre too was dead. Then there were the four forged letters of La Marre to Sir John Stewart, produced in the service, the last of which contains a certificate that Lady Jane was delivered by him of two boys on 10th July 1748. It was stated that Lady Jane knew nothing of this forgery, if it was a forgery. Yet, on the one hand, it is proved, that in a conversation with Lord Prestongrange, she stated, that she thought she could procure a certificate from La Marre, as, for ought she knew, he was still alive. She had, before this, mentioned to Mrs. Menzies that she had in her possession sufficient evidence of the birth of her children, in a letter from the physician who delivered her. So that if she believed these letters as genuine, she would never have declared that to Lord Prestongrange. These four letters were found, after Lady Jane's death, in a trunk belonging to

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her. Mrs. Hewit, on cross-examination, describes the inmates of both Le Brun, and Michell's houses almost alike, viz.—a landlady and a landlady's daughter, who was married, a servant-maid, and a woman lodger. She does not know how Sir John got La Marre, the man-mide-wife, or what place in Paris he resided. That she never saw La Marre except once, after the delivery, when he came to enquire after her, and the eldest boy. Sir John too, while at Paris, wrote two letters, one on 10th July 1748, and one on the 22d July, both dated as from *Rheims*, addressed to Lord Crawford. The former does not allude to the delivery. But the second does. Madame Michell depones, that when they came to her lodgings in July, she heard nothing mentioned of Madame Le Brun, or La Marre,—or even a hint given that Lady Jane was delivered in Paris. She, however, heard them speak of having been at Godefroi's; and that their heads were almost turned with the din and noise in it. They came to her house on 8th July, as appeared from the book, *Livre du Commissaire*, kept in the house. Under that head there is an entry, Sieur Furatl Scotchman, which, according to Mr. Stuart, the Duke of Hamilton's agent, was in the handwriting of Sir John Stewart. The Michells said it was not theirs; and thereafter deposed it was their servant-maid's handwriting, but proof was adduced to shake the integrity of this entry. And when La Marre's widow was examined, she deponed that she never heard her husband mention any thing of the delivery of the foreign lady, or the letters.

It was alleged by the Duke of Hamilton that the eldest boy was bought from a woman of the name of Madame Mignon, the wife of a glassblower, and that the youngest son Sholto was stolen from, and the son of one Sanry, a rope-dancer. To establish these facts, it was proved that a foreign gentleman went about Paris in 1748 seeking poor parents, who were ready to give their children to be brought up comfortably. That he came to the Cure de St. Laurent, and told him that a lady of condition was desirous of doing good to poor families, overburdened with children, and requested him to give him a list of children lately born. The Cure refused, until he was informed of the lady's name. Then he asked the abode of the Sisters of Charity. He goes to other houses on the same day. Saw Madame Mignon, whom he met at the church of Notre Dame. Proposed

to take her child, and bargained with her to come back to the same place next day with the child. Next day she came to the same place with her child, where the gentleman again met her, with a lady in his arm. He asked where the child could change its clothes. She took it into a neighbouring house, Widow Hedward's, where its clothes were changed. Her husband was then with her. The gentleman said that his lady was delivered of two male infants, who were dead, and that he did not know how to acquaint her with it. They went off in a coach; but Mignon's husband followed, to see where they would go to. He followed as far as the Rue Mazarine, where, in a long alley, he lost sight of them. Mignon's child was born 28th June 1748, and certificates of baptism dated 8th July.

Sanry, the rope-dancer's child, (supposed to be Sholto), it was proved was stolen or carried off in November 1749, (a time corresponding with Sir John Stewart's second visit to Paris from Rheims to take Sholto from the nurse), by Duvernay (supposed to be the name assumed by Sir John Stewart on that occasion), on pretence of placing it under a lady of condition, in the following manner: A gentleman called on Madame Sanry. He saw her whole children, and proposed to take her youngest child. She said she must first consult her husband. Next day the gentleman came with a lady for the child, stating that her child would one day get very rich, and do her good. Carried it off in a coach to an inn, which he named to her. Afterwards relenting, they went to the inn, saw their child, and seeing it so well taken care of, they left it; but, on going back again, they could get no farther trace of their child, or of the parties. The gentleman did not tell his name, but said he was an Irishman. It was remarked on this part of the evidence, that Sanry's child did not correspond in age or description to Sholto; and that the public accounts of it, when stolen, gave it out as a child of twenty months. While Mignon's child, supposed to be the appellant, was described by Madame Mignon to be totally different in size, strength, and complexion, and both their evidence was tainted, by the fact that they had consented to sell their children. And no evidence was sworn to, to identify Sir John Stewart and Lady Jane as the parties. They return from Paris to Rheims on 16th August, and took up their abode in the house of Madame Mayctte, bringing the eldest boy Archi-

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bald with them. It is proved he is baptized with great ostentation, by an entertainment given by distribution of money to the populace, and by ringing of bells, &c. And Sholto is given out to nurse, and left behind under the care of La Marre. It is next proved she has a miscarriage three months after the baptism of Archibald. Isabel Walker states the foetus to have been seven or eight inches long, while medical witnesses are adduced, who depone that conceptions of two or three months could not produce so large a foetus. Besides, there were other miscarriages spoken to —a second by Jeanie Mayette, and a third by Mrs. Rutledge —all of these occurring so close in point of time upon each other, as to throw an air of improbability over the whole. Proof was also led to shew, that before they left France, as well as after their arrival in England, they are made aware that the Duke of Douglas entertained suspicions of the status of these children, and that this report was current, but they, notwithstanding, did not take any means to preserve or bring from France evidence of the birth, so as to silence these suspicions at once. In particular, Major Cochran, afterwards Lord Dundonald, wrote the Duke of Douglas an account of a meeting with Lady Jane at the Countess of Stair's lodgings in France. The letter says:—“ Your sister “ went there with the two impostors. So soon as they en-“ tered the room, the Countess called out to Lady Jane, “ You cannot pass those boys upon the world as twins, for “ one of them must be considerably older than the other? “ Your sister changed colour; but the Countess of Stair “ went up briskly to the children, opened their mouths, and “ discovered by their teeth that one of them was six months “ older than the other. Your sister proposes to go to Lon-“ don soon, and take the boys with her. It is thought they “ will die one of these days, as Lady Kinnaird's did. I “ must entertain your Grace with this curious process, which “ has lately been before the Commissaries. Lady Kinnaird, “ having a pique at her husband's heir, gave it out that she “ was with child, and was afraid that she and her child “ would be in danger from the heir, so absconded for some “ time. Ather return, she told that she had been delivered of “ two boys. The heir raised a process against her to pro-“ duce the boys; but her ladyship, finding that the plot “ would be discovered, was glad to give it under her hand “ that the boys were dead. My dearest Lord, I think it

" my duty to inform your Grace of every thing that may  
 " turn out to your advantage, and if ever you find me vary  
 " from the truth, believe me to be a damned villain." (Signed)  
 " THOMAS COCHRAN." The Countess of Stair herself was  
 dead; but, as throwing great improbability on the truth of  
 the contents of this letter, it was proved (on cross) that Lady  
 Stair, for long after its date, continued Lady Jane's friend.  
 That she rendered her assistance, and even wrote to her bro-  
 ther many letters, beseeching aid on her behalf. It is further  
 proved by Mrs. Hepburn, relict of Major Hepburn of the  
 British Dragoons, that she recollects, " soon after the Duke  
 " of Douglas' marriage, the deponent saw a letter to the  
 " Duke from Major Cochran, now Lord Dundonald,"—(de-  
 scribes the contents of it as above.)—" Depones, that in the  
 " end of the year 1758, or beginning of the year 1759, when  
 " the Duke of Douglas lived at the Abbey, Lady Stair  
 " came there one day to make a visit, and after being with  
 " the Duke more than an hour in a separate room, she came  
 " into the drawing-room, where the deponent was, in com-  
 " pany with the now Sir John Stewart of Castlemilk, and,  
 " as the deponent thinks, Mr. Dundas of Castlecary; that  
 " the Duchess of Douglas came into the room immediately  
 " after Lady Stair, and in a few minutes the Duke like-  
 " wise entered; that Lady Stair, upon coming into the  
 " drawing-room, appeared to be in a violent passion, and  
 " said, she had now lived to a great age, and had never be-  
 " fore been brought into any clatters or lies of that kind;  
 " and upon the Duke's coming in, she went up to him and  
 " said, that she had never doubted of the children being  
 " Lady Jane's; that, on the contrary, she had begged Lord  
 " Dundonald to carry a letter from her to Duke of Dou-  
 " glas, begging his Grace to do something for Lady Jane  
 " and the children; when Lord Dundonald (Major Cochran)  
 " told her that it was needless."—" That Lady Stair said,  
 " she never had such conversation with Lady Jane, as is  
 " mentioned in Lord Dundonald's letter to the Duke, nor  
 " ever doubted of the children being Lady Jane's or twins,  
 " until she heard of a letter from Count Douglas." Mrs.  
 Hewit deponed to a great many letters received by Sir John  
 Stewart from La Marre while at Rheims, yet the only let-  
 ters found, purporting to be signed by him, addressed to  
 Sir John, were the four forged letters before noticed, one  
 of which professed to contain a certificate by him of the

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birth. The detection of these forged letters \* was not rested so much on a *comparatio litterarum* as from a critical examination of them by French scholastic witnesses, who deponed that they could not be written by a Frenchman. That they were written by an Englishman. And that this was obvious from the Anglicisms, orthography, idiom, and particular phrases used in these letters.

Upon the evidence the Lords of Session pronounced this July 15, 1767. interlocutor, by a majority of 8 to 7:—"The Lords having "considered the state of the process, writs produced, and "testimonies of the witnesses adduced, and heard parties' "procurators thereon, and having advised the same with "the memorials, observations, and other papers given in by "both parties, they sustain the reasons of reduction, and "reduce, decern, and declare accordingly."

The majority of the Court stated their reasons as follows; —That though the acknowledgment of the parents, and the habit and repute were good presumptive evidence, sufficient to warrant the verdict of a jury in serving him heir, yet where, in this case, *that* service was sought to be reduced, such proof by itself is not *probatio probata* of filiation. And accordingly such service and presumptive evidence upon which it proceeded, might be redargued by proof that the appellant was not the son of Lady Jane Douglas:—That, looking to the concealment of the marriage, and mystery attending the birth, which in the case of a real birth were unnecessary—looking also to the contradiction and falsehood as to the house in which the child was born—the persons present—La Brune—La Marre, the accoucheur, there could be no doubt that the appellant was not the real child of Lady Jane. By a letter from Sir John, it appears that the child is born, first in the house of Madame Michelle—then this is corrected, and it is said to be born in the house of La Brune. Mrs. Hewit and Sir John's accounts are also inconsistent; so also are Lady Jane's, for she had given accounts of the birth equally conflicting, had assigned places and names that could not be found, and dates that did not agree, and Sir John's declaration had brought out the fact of La Marre's forged letters. If truth was at bottom, why forge letters in the name of La Marre, the man-midwife? What necessity was there

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\* *Vide Appendix.*

for any such? Could La Marre not be got himself? How was he not adduced? But further, the parents are, soon after the birth, made acquainted with reports in regard to the children,—namely, that they were believed to be fictitious. Yet notwithstanding this, they do not take steps, like innocent people, to vindicate their character, and support the integrity of their issue. They live for years, and submit without a murmur to reproach.

The minority of the Court laid great stress on the acknowledgment of the parents themselves, and the habit and repute,—holding that these constituted evidence of the highest kind. And when coupled with the name in the baptismal records, was evidence against which no contrary evidence could be allowed. Besides this, there was added positive proof of pregnancy and birth, coming from witnesses who were constantly and permanently about and living with Lady Jane—witnesses too of the highest rank and most unimpeachable character. They also held, that being already served heir, and enjoying the full status as such, the appellant could not be deprived of this status except upon the strongest possible proof that he was an impostor, and not Lady Jane's child. That the proof of imposture, as attempted to be led, was made to rest on a great variety of detached circumstances, which prove nothing positive, but only create suspicions and doubts, and by witnesses too, having only a cursory or accidental opportunity of meeting in a stage coach, on a journey, or at an inn, with all the usual hurry attendant on such situations, and with little or no opportunity of taking any particular observation of Lady Jane's condition. They held, that there were undoubtedly concealment and mystery, but not such as was not sufficiently explained by the circumstances in which they were then placed. Their circumstances were poor, and their prospects dim and doubtful. This privacy might have been assumed for economy, while it was very unlikely that they, in this situation, would have burdened themselves with two supposititious children, and that to this scheme they would have got Mrs. Hewit, a gentlewoman, and their two servant women, to agree and concur, far less the parents, who are said to have sold their children. But, be the falsehoods and contradictions in proof what they may, this was clear, that the most positive evidence was adduced of Lady Jane Douglas having been pregnant, and that she was again pregnant, and had a miscarriage. This lays a foundation for the reality of his birth, which, when

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taken together with his parents' acknowledgment, were decisive of the present question. He ought not to suffer from his parents' falsehoods or concealment—and the rule, "false in one thing, false in all things," ought not to apply.

Against this judgment of the Court of Session, the present appeal was brought to the House of Lords.

*Pleaded for the Appellant by the late Lord Thurlow as Counsel.*—After a learned comment on the proof as adduced, deducing and insisting therefrom, that by and under it, the status of the appellant was clearly established, it was then pleaded in point of law,—That the appellant having, in his service to his uncle, the late Duke of Douglas, brought a proof of his possession of the state of filiation to Sir John Stewart and Lady Jane Douglas, in every article wherein such possession can be thought to consist, and by every species of evidence. 1<sup>st</sup>, The *treatment* of him as their son, proved by many witnesses who had seen him often under those circumstances. 2<sup>d</sup>, The *nomination* of him by his parents, proved by many witnesses who had heard it—by many original letters, and by more solemn acts of baptism, deeds, and wills. 3<sup>d</sup>, His *reception* as the son of Lady Jane Douglas every where, by the world as well as in private circles, proved by all the witnesses. 4<sup>th</sup>, His being *habit* and *repute* Lady Jane's son. 5<sup>th</sup>, *Possession* of his state of filiation, inferring his title by presumption of law,—he was entitled to be protected in this possession, until the contrary be proved, such possession placing necessarily the onus of proving the contrary on the adversary who impeaches it. But, abstracted from the possession of his status, there was the most positive evidence of witnesses, to his actual birth of the body of Lady Jane Douglas, independently altogether of the host of concurring testimony, of itself sufficient.

*Pleaded for the Respondents.*—The appellant has earnestly endeavoured to convert the subject of this contest into a *question of law*, wishing to avoid the decision upon the *question of fact*. When it is pretended that consequences hurtful to society may arise from a party who is in full possession of his *status* of filiation and birth, having that status and birth challenged and impugned after long years possession, it is meant, either, that in no case whatever, a challenge of this nature, against a person acknowledged by his reputed parents, ought to be allowed; or, that it ought not to be allowed in cases similar to the appellant's. The first of these propositions cannot be maintained is self-evident. If in no

case a challenge of this nature were admitted, then if a woman of eighty should pretend to be delivered of two or three children at a birth, whom she and her husband acknowledged as theirs, the state of such children would be secure from challenge. Hence, therefore, in this case, the question of law, as to the proof and *onus probandi*, stands exactly in the same situation with regard to the weight of presumption to be allowed, or the decree of evidence to be required, as it did before the jury: And whatever evidence was necessary to the proof of the appellant's title at the service, is equally necessary to support his case in the present reduction of his service. This practice is quite the rule of the law of Scotland; which is based upon very obvious reasons, because, to obtain a verdict of service, the very slightest degree of evidence is sufficient. But that this facility of service, calculated for the ease of general succession, might not be without redress, in particular cases, where there is reason to doubt the truth of the verdict, the law allows, to any person having interest in the matter, to bring this service before a court of review. Accordingly, in reductions of service, the Court of Session judge and stand in room of the jury in deciding on such questions. The very name of the Inquest of Error proves this, and therefore the proof must be gone into without respect to such service, which ought not to be of any avail whatever in the decision of the question.

Looking, therefore, to the whole proof, the respondents contended that the appellant was not the son of Lady Jane Douglas, and consequently, not the heir of tailzie and of provision to Archibald, Duke of Douglas.

After hearing counsel for several days in the House of Lords,

Lord Chancellor (Camden) spoke as follows:—"The cause before us is, perhaps, the most solemn and important ever heard at this bar. For my own share, I am unconnected with the parties; and having with all possible attention considered the matter, both in public and private, I shall give my opinion with that strictness of impartiality, to which your Lordships have so just and equitable a claim. The question before us is, "Is the appellant the son of the late Lady Jane Douglas or not?" I am of the mind that he is; and own that a more ample and positive proof of a child's being the son of a mother never appeared in a court of justice, or before any assize whatever.

"The marriage of Lady Jane to Colonel Stewart, August 10th

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1746, is admitted at all hands. Her pregnancy in January 1748, and the progress of it, were observed by many people: at Aix-la-Chapelle it was notorious: her stays were widened; the nuns of the convent of St. Anne's discerned it, notwithstanding Lady Jane's modesty; the maid servants are positive as to the fact; the Earl of Crawford wrote an account of it to the Duke of Douglas, not as an hearsay, but as a fact, of which he himself was fully satisfied by ocular inspection; and if there be a pregnancy, there must be a delivery; which accordingly happened, by the positive evidence of Mrs. Hewit, who has deposed that "she received them into her lap as they came from Lady Jane's body". She was delivered of twins on the 10th of July 1748, at Paris, in the house of Madame la Brun, in the Fauxbourg de St. Germain. Lady Jane's ability to bear children is established by many witnesses; and a miscarriage after the birth of twins, still more and more proves the delivery.

"But, my Lords, there is another proof no less convincing, that the appellant is really the son of Lady Jane, and this arises from the uniform tenderness shewn towards him. 'Tis in proof, that on every occasion she showed all the fondness of a mother; when he casually hit his head against a table, she screamed out and fainted away; when her husband, the Colonel, was in prison, she never wrote to him without making mention of her sons: she recommends them to clergymen for the benefit of their prayers; is disconsolate for the death of the youngest: takes the sacrament: owns her surviving son: does every thing in her power to convince the world of his being hers: blesses and acknowledges him in her dying moments, and leaves him such things as she had. Sir John likewise shows the same tenderness in effect; he leaves him 50,000 merks, by a bond in September 1763, ten years after the death of Lady Jane, and on his deathbed solemnly declares, before God, that the appellant is the son of Lady Jane. "I make this declaration," said he "as stepping into eternity." A man that is a thief may disguise himself in public, but he has no occasion for any mask when in private by himself.

"These positive declarations convinced the Duke of Douglas, and he left his dukedom and other estates to his nephew, the appellant, who was regularly served heir thereto in September 1761, when he was possessed of all the birth-right of a son, so far as the oaths of witnesses, the acknowledgment of parents, and an established habit and repute could go. The cruel aspersions thrown out against Lady Jane and the Colonel, had been refuted by the late Duke of Argyle and the Countess of Stair. No mortal doubted the appellant's being the son of Lady Jane except Andrew Stuart, his father, Archibald Stuart; Major Cockran, who is married to Stuart's sister; White of Stockbriggs, a principal actor in these scenes. These doubted the matter; and Andrew Stuart, &c., as by concert, went over to France, not to procure evidence of a real fact, but to suborn wit-

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nesses to establish an article that never existed except in their own imagination : the design was bad, and the means to accomplish it were no less criminal. 'Tis needless to follow the searcher through all the scenes of his inquiry ; the result of which was, to return to Scotland, enter an action against the appellant, and bring his own father to condemn him, at a time when the old gentleman was in a condition every way deplorable And, taking advantage of his inaccuracies, he makes a second tour to Paris, where he published a *monitoire* entirely to seduce witnesses, and influence them to commit the blackest perjury. In this paper he describes the person of Sir John Stewart, Lady Jane Douglas, and of Mrs. Hewit ; asserts that they had purchased two children, whom they wanted to impose upon the world, in order to defraud a real heir of an immense estate and fortune : and inviting all who could give light into the matter, to come to his lodgings, which he particularly described.

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"Mr. Stuart certainly appeared like the guardian of the Duke of Hamilton ; a pompous title, which drove several to their own destruction, and in hopes of a reward. Among the number of those was Madame Mignon, a glass manufacturer's spouse ; who, after conversing with Andrew Stuart and his clerk, and receiving presents from them, comes in before the Tournelle Criminelle, and deposes, that she had sold her own child to foreigners whom she did not so much as know. "Can a woman forsake her sucking child?" is a rhetorical remonstrance handed to us from the highest authority. The thing is incredible, and yet the woman has sworn to it!—a circumstance sufficient to render her testimony of no force, when opposed to the dying declarations of Lady Jane Douglas and Colonel Stewart, and to the positive oath of Mrs. Hewit, whose character is established on a good foundation ; but, take the declaration of Madame Mignon in all its extent, yet she has said nothing to affect the appellant ; the time when, the people to whom, with every other circumstance, prove her not to have been the mother of the young gentleman ; his complexion, the colour of his eyes and hair, prove that he was not her's. The same thing might be said of the son of Sanry the rope-dancer, whom the counsel for the respondent would infer to be the child Sholto, the younger of the twins ; and, as a strong proof of the same, urged, the two were but the same identical person under different names ; and your Lordships were entreated to keep in your view, the rupture under which each of them laboured, in order to prove the identity ; but how comes all out? Sanry's child could speak in November 1749, but Sholto could not utter a word for some months after he came to Mrs. Murray's house in December 1749. And now evidence is offered to be produced at your Lordships' bar that the child Sholto had no rupture in 1749 ; nay, that he was as sound as any person within these walls ; certainly Mr. Murray, the most material witness in this affair, is more to be credited than Madame.

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" Your Lordships have heard much ingenuity displayed, in order to prove that Lady Jane's pregnancy was imaginary ; the symptoms are allowed, but the reality is now denied ; though once Andrew Stuart himself, was forced to acknowledge that Lady Jane was actually with child. If Lady Jane, or any other woman, had such symptoms, it is impossible she could have been eased of them so soon in any other manner as by a delivery ; had she been ill of a dropsy, her bulk would not have been totally diminished in so short time as from the 2d of July to the first week in August ; when all who saw her at Rheims concluded that she had but lately lain-in. Great stress has been laid upon the letters said to have been forged in the name of Pierre la Marre, the man mid-wife, the person who delivered Lady Jane. I admit them to be forged, and yet this forgery is with me a proof of Lady Jane's innocence. Sir John's hardships are admitted ; and, if after so long a confinement, he should cause the letters that had passed between La Marre and himself to be transcribed, in order to amuse himself, or to satisfy Lady Jane that they were not lost, it was no way criminal. Lady Jane received them ; but, observing they were not originals, she laid them by ; so conscious was she of her own innocence that she did not use them ; nor ever would they have made their appearance, had it not been for the conduct of Andrew Stuart, who, upon getting an order to search Lady Jane's repositories, found out these letters, produced them in Court against Sir John, when under all the miserable circumstances of a man groaning under a load of years, infirmities, and the acutest pains.

" The evidence of Godefroi, the landlord of the Hotel de Chalons, in the Rue St. Martin, is contradictory and inconsistent, his books being every way defective and erroneous. Nor does Andrew Stuart appear in a favourable light in this particular ; when first he came to Godefroi's house, both the man and his wife were ignorant of the matter ; neither the one nor the other recollects Lady Jane Douglas or her husband, till Andrew Stuart, desiring a sight of the Livre d'Inspecteur, he found two articles, one of them Mr. Flurall, Escoissois, et sa famille sont entre 8me Juillet 1748 ; and this he positively affirms, with oaths and imprecations, to be the handwriting of Sir John Stewart, with which he pretended to be thoroughly acquainted ; but he was obliged to retract when other postages were found to be of the same handwriting ; this postage was found to be posterior to one written on the 12th, and the landlady of the house declared that she herself had marked it down. He had fifteen rooms and ten closets, which they pretended always to be full, and yet in their book it does not appear there was above three persons in them during Colonel Stewart's abode ; and what is pretty strange, they had many women lodgers during that year, and yet they depose, they remember none but this lady, whom Andrew Stuart would have to be Lady Jane Douglas. They even differ with respect to the names of their servants. The counsel at the bar have acknowledged the inaccuracy

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of the books, owing to the avocations of the man elsewhere, and to the inadvertency of his spouse, continually hurried by a multiplicity of business. Besides, a postage in a book, such as the *Livre d'Inspecteur*, which, like a waste book, contains things just as they occur; or the *Livre d'Epense*, to which the articles of the former are transferred; bear no manner of convincing proof that the persons mentioned in these, staid at such and such places, it being a customary thing to mark down the name of the person the moment he takes the lodging; and it is notorious that many persons have paid a week, nay a month's lodging, without sleeping a night in it: and this is no more than equity, since the same was reserved for their use.

" But here, my Lords, the pursuers in this affair have destroyed their own cause; they have brought a sort of proof that Lady Jane Douglas was at Michelle's house, called *Le Petit Hotel d'Anjou*, in the Rue Serpente, Fauxburgh St. Germain; and this at the very time when they would prove her to have been at the house of Godefroi, of whom so much has been said and heard. Michelle and Godefroi disagree in every thing except in the irregularity of their books; and indeed it is hard to say which of the two excels most in that particular. But, not to insist on the irregularities, it is proved to be the practice in Paris, and of Michelle in particular, to write people's names in these police books, as entered on the day the room was hired, though the person does not enter for some days after.

" To insist on these things, my Lords, is tedious; and yet the importance of the case requires it. One Madam Blainville swears, that on one of the days between the 8th and 13th of July she accompanied Lady Jane in a coach to take a view of Versailles, and at another time to see the Palace de Vendome; but this witness is in every respect contradicted by a multiplicity of evidence; and in every view her testimony appears to be absurd and preposterous. First, She is contradicted by Mrs. Hewitt, whose deposition bears great weight with me, as also by other witnesses. For, first, she, Blainville, says, that Sir John and his family were eight days in Michelle's before the child was brought to the house; whereas Michelle's family all swear that he was brought next day. Secondly, She says that the child was given to the nurse, La Favre, the very night of his arrival; that she saw her carry him home with her, and that Lady Jane visited him in the nurse's house; whereas, on the contrary, it is proved that Favre remained four days at the hotel, during which period Lady Jane went no where abroad. Thirdly, She deposes that no person visited Sir John and Lady Jane during their stay at Michelle's; whereas, by the oath of Madam Favre, a gentleman visited him there; but, be that as it may, Lady Jane was delivered on the 10th of July; and Blainville does not say she went to Versailles till the 27th; and it is no new thing for a lady, however delicate, so long after delivery, to go so far, in a country where the weather and roads are so remarkably fine, and the carriages every way easy and convenient.

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"All these objections to the reality of the appellant being the son of Lady Jane are imaginary, and hitherto have been refuted, to the honour of the innocent, and the more firmly establishing him in the possession of his birthright. They only tend to render her virtues more brilliant and illustrious; for, as the allegations never existed in fact, but in the imagination of Andrew Stuart, so when put to the trial, they must necessarily fall to the ground. Thus he has asserted, that Colonel Stewart received £350 from the Earl of Morton's banker some days before Lady Jane's lying in, and from thence would infer that her delivery in Madame La Brun's, an obscure house, was only to carry on the imposture; but now it appears that this money was not paid till sixteen days after. How unfortunate for the Duke of Hamilton to be under the directions of such a man! one who has involved him in such an immensity of expense; and thus, by examining a multitude of witnesses upon articles really foreign to the cause; which, indeed, is not the Duke of Hamilton's, it is the case of Andrew Stuart, who has acted so strange a part as well to deserve the observation made at the bar with great propriety, 'that if ever I was to be concerned in any business with him, I should look upon him with a jealous eye.' I shall not follow the noble lord who spoke last through the various descriptions he has given us of midwifery.\* His observations may be just, but they cannot affect the character of Lady Jane Douglas, or the cause of the appellant, her son. The question before us is short; Is the appellant the son of Lady Jane Douglas or not? If there be any lords within these walls who do not believe in a future state, these may go to death with the declaration that they believe he is not. For my part, I am for sustaining the positive proof, which I find weakened by nothing brought against it; and in this mind I lay my hand upon my breast and declare, that in my soul and conscience I believe the appellant to be her son."

Duke of Bedford then spoke in favour of Andrew Stuart's procedure, and in commendation of the Tournelle.

Duke of Newcastle spoke before Lord Sandwich and the Lord Chancellor.

Lord Mansfield next spoke:—

"My Lords,

"I must own that this cause before us, is the greatest and most important that occurs to me; it is no less than an attack upon the virtue and honour of a lady of the first quality, in order to dispossess a young man of an eminent fortune, reduce him to beggary, strip

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\* Lord Sandwich, a lay lord, who took three hours to deliver his opinion against the appellant.

him of his birthright, declare him an alien and a foundling. I have slept and waked upon the subject, considered it upon my pillow to the losing of my natural rest ; and with all the judgment I was capable, have considered the various articles that make up this long and voluminous cause, upon which I am now to give my opinion before your Lordships.

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" I apprehend that, in the matter before us, three things are to be considered,—the situation of Lady Jane before her delivery,—at her delivery,—and after it was over,—to all which the Chancellor has spoke with great propriety. It is proved, beyond a possibility of doubt, that she became pregnant in October 1747, at the age of 49 years, a thing far from being uncommon, as is attested by physicians of the first rank, and confirmed by daily experience ; and that, in the month of July, she was delivered of twins, one of whom died, the other is still alive. He has been presented to the world by Sir John Stewart and Lady Jane Douglas as their son ; nor can he be wrested from the hands of his parents, unless some other had, in their lifetime, claimed him as their child, in a legal and justifiable way.

" This action, my Lords, did not lie against the appellant as an impostor ; for an impostor, in the sense of the law, is a person who wilfully and knowingly pretends to be a different one from what he really is, in order to defraud another, and to impose under a fictitious name upon the public. If any be an impostor, it must have been Lady Jane, whom they ought to have prosecuted in her lifetime, and not at the distance of nine years after her death. The method of discovering an impostor, is to bring his accomplice to the Court before which the impostor was arraigned ; and if, after a fair trial, the accused person be found guilty, let him take the consequences thereof ; but this the respondents have neglected ; the appellant has been for five years and four months and twelve days, the acknowledged son of Lady Jane Douglas, and for thirteen years and two months the son of Sir John Stewart, before any attempt was made to rob him of his parents, his birthright, and his all.

" As the Lord Chancellor has anticipated much of what I intended to speak upon this subject, so I shall only touch at the situation and character of the deceased, whom I remember in the year 1750 to have been in the most deplorable circumstances. She came to me (I being Solicitor-General) in a very destitute condition, and yet her modesty would not suffer her to complain. The noblewoman was every way visible, even under all the pressure of want and poverty. Her visage and appearance were more powerful advocates than her voice ; and yet I was afraid to offer her relief, for fear of being construed to profer her an indignity. In this manner, she came twice to my house, before I knew her real necessities, to relieve which now was my aim. I spoke to Mr. Pelham in her favour ; told him of her situation with regard to her brother the Duke of Douglas, and of her present straits and difficulties. Mr. Pelham, without delay,

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laid the matter before the king. The Duke of Newcastle, then being at Hanover, was wrote to, he seconded the solicitation of his brother. His Majesty immediately granted her £300 per annum out of the privy purse; and Mr. Pelham was so generous as order £150 of the money to be instantly paid. I can assure your Lordships that I never did trouble his Majesty for any other. Lady Jane Douglas was the first and last who ever had a pension by my means. At that time, I looked upon her to be a lady of the strictest honour and integrity, and to have the deepest sense of the grandeur of the family from whence she was sprung; a family conspicuously great in Scotland for a thousand years past; a family whose numerous branches have spread over Europe,—they have frequently intermarried with the blood royal,—and she herself was descended from Henry VII. I took care that his late Majesty should be made acquainted with her family and name, to the intent that, though she was married to Colonel Stewart, a dissipated and licentious man, who had been in the rebellion of 1715, yet he would pass it over, as she was of a race who had always been eminently loyal, her brother having charged as a volunteer at the head of the cavalry in the year 1715, when his cousin, the Earl of Forfar, died like a hero in defence of the government; and that his Grace had, in the year 1745, treated the rebels and their leader with contempt and ridicule. And indeed his Majesty, from his wonted magnanimity, spoke nothing of her husband, but treated her with all the respect due to a noblewoman of the first rank and quality; one who carried all the appearance of a person habituated to devotion, and for a number of years trained up in the school of adversity and disappointment.

"Is it possible, my Lords, to imagine that a woman of such a family, of such high honour, and who had a real sense of her own dignity, could be so base as to impose false children upon the world? Would she have owned them on every occasion? Was ever mother more affected for the death of a child than she was for that of Sholto, the younger of her sons? 'Will you,' said she, 'indulge me to speak of my son?' and cried out with great vehemency, 'O Sholto! Sholto! my son Sholto!' And after speaking of his death, she said, 'she thanked God that her son Archy was alive.' 'What,' said she, 'would the enemies of me and my children say, if they saw me lying in the dust of death, on account of the death of my son Sholto?' 'Would they have any stronger proof of their being my children, than my dying for them?' She still insisted, that the shock she had received by the death of Sholto, and other griefs she had met with, were so severe upon her, that she was perfectly persuaded that she would never recover, but considered herself as a dying woman, and one who was soon to appear in the presence of Almighty God, and to whom she must answer. She declared that the children Archy and Sholto were born of her body; and that there was one

blessing, of which her enemies could not deprive her, which was her innocence, and that she could pray to Almighty God for the life of her other son; that she was not afraid for him, for that God Almighty would take care of him; and what is remarkable, the witness, Mary Macrabie observed, that the grief for the loss of her child grew upon her. Would she, my Lords, have blessed her surviving child on her deathbed? Would she have died with a lie in her mouth, and perjury in her right hand? Charity, that thinketh no evil, will not suffer me for a moment to harbour an opinion so cruel and preposterous. Or, can we suppose that two people, who had not wherewith to support themselves, would be solicitous for, and shew all the tenderness of parents towards the children of creatures who, forgetting the first principles of instinct and humanity, had sold their children to people whom they did not so much as know by their names? The act of Joseph's brethren in selling him, is represented as wicked and unnatural; but, indeed, the crime of Madame Mignon, and of Madame Sanry, is still more black and atrocious. To carry this a little further, suppose Lady Jane Douglas had acted thus, out of a principle of revenge towards the family of Hamilton, yet Sir John Stewart had no occasion to do so, much less continue the vindictive farce after her death; especially when married to another spouse. And here we may see Sir John as much a parent to the appellant as Lady Jane; he was every way fond of him; it is in evidence; I know it to be true; my sister and I have been frequently at Mr. Murray's with them, and were always delighted with the care we observed. No mortal harboured any thoughts of their being false children at that time; I mean in 1750 and 1751. Every person looked upon them as the children of Lady Jane Douglas and of Colonel Stewart. The Countess of Eglinton, Lord Lindores, and many others, have, upon oath, declared the same thing.

"No sooner does the Colonel hear of the aspersions raised at Douglas Castle, and of Mr. Archibald Stuart's swearing that Count Douglas, a French nobleman, had informed the Duke of Douglas that they had been bought out of an hospital, than he returned an answer to Mr. Loch, who gave the intelligence in a letter to Mrs. Hewit, and wrote him in all the terms of a man of spirit, cordially interested in the welfare and happiness of his son. Both he and Lady Jane begged the favour of Chevalier Douglas, a French gentleman and officer, then at London, to acquaint his cousin the Count with what was said of him. This the Chevalier undertook, and fulfilled with the fidelity of a man of honour; and the Count, in consequence of the application, wrote a letter, not only to Lady Jane, but to her brother the Duke, in all the language of politeness and humanity, disowning what was said of him.

"But, my Lords, the Duke of Douglas himself was fully satisfied of the appellant's being the real son of his sister Lady Jane; for, on beginning to be known, after his marriage, and to relish the

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See p. 17.

See p. 22, Letter I.

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 See p. 25,  
 Letter I.

pleasures of social life, he became very inquisitive "about the size, " shape, and complexion of the appellant, and if he appeared to be a "smart boy." He employed Sir William Douglas and others, in whom he could confide, to enquire of Mrs. Hewit, Lady Jane's companion, and of Euphemia Caw, and Isabel Walker, the two maid-servants who had lived with them when abroad, and observed their conduct in the most unguarded moments, concerning the birth of the children: he even searched into the character of these; and it appears from the depositions of clergymen and gentlemen of the first rank in that country, that they were women worthy to be believed. He even went in person to visit Mrs. Hewit, conversed with her in presence of his gentleman, Mr. Greenshields, concerning his sister's delivery; and the accounts given by these, like the radii of a circle, all pointing toward one and the same centre, confirming the reality of Lady Jane being the mother of the young gentleman, he was satisfied, acknowledged him for his nephew, and left him his heir.

"If the Duke of Douglas, after so serious an enquiry, was convinced, why should not we? 'Tis true, his Grace has sometimes expressed himself warmly against the surname of Hamilton even in Lady Jane's lifetime; but never so warmly as to prefer a supposititious child to the Duke of that name; for he only declares, that if he thought the children were Lady Jane's, he would never settle his estate on the family of Hamilton; nor did he, till after detecting the frauds and conspiracies that had been so long and so industriously carried on against his sister and himself, make any alteration in his first settlement.

"After the Duke's death, the appellant was served heir to his uncle, according to the form prescribed by the law of Scotland, upon an uncontroverted evidence of his being the son of Lady Jane Douglas, takes possession of the estate, and is virtually acknowledged heir by the Earl of Selkirk, and by the Duke of Hamilton's guardians themselves; for these enter actions before the Court of Session, declaring their right to certain parts of the estates, upon some ancient claims which the judges there declared to be groundless; but in the whole action there was not the least intimation that Mr. Douglas was not the son of Lady Jane.

"'Tis needless to trouble your Lordships with the conduct of the respondent's guardians at Paris and elsewhere upon the Continent. Nothing has been discovered that could throw the least blemish upon the honour of Lady Jane Douglas or Colonel Stewart; they have indeed proved her straits there, and his imprisonment here; but both these circumstances carry a farther confirmation that the appellant is their son; for in every letter that passed between them the children are named with a tenderness scarce to be believed: whereas, had they been counterfeits, as pretended, they would have been apt to upbraid one another for an act so manifestly tending to involve them in their sufferings.

" Suppose, my Lords, that Mignon, the glass manufacturer's wife, the pretended mother of Mr. Douglas, had deposed the same things in Lady Jane's presence, as she has so long after her death, from her evidence it appears she had never seen Lady Jane, and by her words, both in private and public. she seems to deserve no manner of credit; while the oath of Mr. Murray, a principal witness, has destroyed every thing she has asserted. The same thing might be said of Sanry, the rope-dancer's spouse, whose child's rupture we were earnestly desired to keep in view, to prove him to have been the identical Sholto, the younger of the twins; and now evidence is offered that the child Sholto had no rupture, but was as sound as any within these walls. Your Lordships have been told, and I believe with great truth, that a gentleman, shocked at the assertion, had wrote to the counsel, that the influence arising from so false a suggestion might be prevented. I always rejoice to hear truth, which is the ornament of criticism, and the polished gem that decorates a bar.

" The scrutiny in France, followed by an action in Scotland, produced two things never intended by them. It brought forth a striking acknowledgment of the appellant by his father Sir John Stewart, as is manifest from the bond of provision read at your Lordships' bar. Sir John openly acknowledged him before the Court of Session, in the midst of a crowded multitude, and when labouring under a load of anguish and pain; nay, when by himself he solemnly declared before God, in the presence of a justice of the peace and two clergymen, that the young gentleman was his son. It likewise established the character of Lady Jane; for, on examining the proof obtained through the vigilance of the Duchess of Douglas, Lady Jane's reputation is unsullied and great. All who had the honour of being known to her, declared that her behaviour attracted universal esteem; and Madame Marie Sophi Gillien, a maiden lady with whom she lodged several months, depones that 'Lady Jane was very amiable, and gentle as an angel.' It further proved that the elder child, the appellant, was the exact picture of his father, and the child Sholto as like Lady Jane as ever child was like a mother.

" I have always considered likeness as an argument of a child being the son of a parent; and the rather as the distinction between individuals of the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men, every one may be known from another. If there should be a likeness of features, there may be a discrepancy of voice, a difference in the gesture, the smile, and various other things, whereas a family likeness runs generally through all these, for in every thing there is a resemblance, as of features, size, attitude, and action. And here it is a question, Whether the appellant most resembled his father Sir John, or the younger Sholto resembled his mother Lady

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Jane? Many witnesses have been sworn to Mr. Douglas being of the same form and make of body as his father. He has been known to be the son of Colonel Stewart by persons who had never seen him before; and is so like his elder brother, the present Sir John Stewart, that, except by their age, it would be hard to distinguish the one from the other.

"If Sir John Stewart, the most artless of mankind, was actor in the *enlevement* of Mignon and Sanry's children, he did in a few days what the acutest genius could not accomplish for years. He found two children, the one the finished model of himself, and the other the exact picture, in miniature, of Lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof, that in size, complexion, stature, attitude, colour of the hair and eyes, nay, and in every other thing, Mignon and his wife, and Sanry and his spouse, were *toto cælo* different from and unlike to Sir John Stewart and Lady Jane Douglas. Among eleven black rabbits, there will scarce be found one to produce a white one.

"The respondent's cause has been well supported by the ingenuity of its managers; and great stress has been laid upon the not finding out the house where Madam la Brun lived, and where the delivery was effected; but this is no way striking, if we consider that houses are frequently pulled down to make way for streets, and houses are built upon the ground where streets ran before. Of this there are daily examples in this metropolis. However, we need enter into no arguments of this kind, as there is a positive evidence before us: nor is it possible to credit the witnesses, some of them of a sacred character, when they speak of Lady Jane's virtues, provided we can believe her to have been a woman of such abandoned principles as to make a mock of religion, a jest of the sacrament, a scoff of the most solemn oaths, and rush with a lie in her mouth and perjury in her right hand, into the presence of the Judge of all, who at once sees the whole heart of man, and from whose all discerning eye no secrecy can screen—before whom neither craft nor artifice can avail, nor yet the ingenuity and wit of lawyers can lessen or exculpate; on all which accounts, I am for finding the appellant to be the son of Lady Jane Douglas."

It was therefore ordered and adjudged that the interlocutor complained of be reversed.

For the Appellant,

{ C. Thurlow, Ja. Montgomery,  
 Fl. Norton.

For Lord Douglas Hamilton } J. Dunning, Ad. Ferguson,  
 and Sir Hew Dalrymple, { Tho. Lockhart.

For the Duke of Hamilton, C. Yorke, Al. Wedderburn.

## APPENDIX.

*Copy Letter written by Sir John Stewart in French to Count Douglas, to shew that the modes of expression &c. used are the same with those used in the four following Letters.*

1769.

MONSIEUR,

Sensible de votre merite, et des temoynages que vous avez bien voulu de doner a toute occasions de votre attentions, pour tout ce que me regardoid mon inetreit joint a l'egard que vous avez pour la justice, me fait experer que vous voudriez bien prendre la peine, aupres du Comte Douglas notre cousin. de lui fair scavoir que en Ecos, on a fait voir unne *letter* au Duk de Douglas mon frere, plein de sausete les plus grossiers que vous aurez la *bounté* d'expliquer a mons le Comte.

Qui est doner au Duke Come l'auteur de cette letter. Je suis tres *persuadé* de l'imposture, et que Mr le Comte est incapable d'un *tell* attent contre mon honneur, ou la justice et la verite sont, sacrafie en meme temps : mais come mes ennemis (voulen profiter de refroidissement qui est depuis quelque temps entre mon *frer* et moy, ont forgé cette *letter* avec bien d'autre mensonges, pour Ealgir la breche) afin qu' en *allienent* les affections de mon *frer* la famille D'Hamilton soit agrandi, j'esper qu'a vos iustances, et me requesition monsieur le Comte voudra bien prendre la prendre la peine de m'ecrir, et au mesme temps, sous mone Envelop d'adresse unne *letter* pour mon frere pour lui *fair* voir l'imposture, ce que peuvent vray semblablement lui *fair* voir coment il est environé de ses Ennemis, qui pour agrandir une famille, d'ont l'intres est tout oposé, a celle du sien, ils ont l'hardiness et efronterie. d'oser attaquer, *l'honneur* et la veracité de sa seur dont il doiv naturellement entre le protecteur. J'attend des vos nouvelles avec les *letters* desire, au plut tot, et suis en *attendent* avec haut. Es time Monsieur votre affectioné Cousine et tres humble Servt.

Quoaque j'ay n'ay pas l'honneur de connoiter Monsieur le Cont Douglas vous aurez la *bounte* de lui *fair* mes compliments.

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1769. *Four Letters from La Marre, Man-midwife, to Sir John Stewart,  
supposed to be forged.*

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No. I.

*Paris, Aoust 26, 1749.*

MONSIEUR,

Vous serez peutetre surpriz et *mesme fache* que j'ay tant *difere* de vous donner nouvelles de votre chere Enfant qui Dieu *mercy* se port bien a present mais pour quelque *temps passe* il a beaucoup soufert en poussent ses dents a qui lui *empeche* de dormir et lui a *rendue* de fort. mauvof heumeur Come j'etois *perswade* qu'il ny avoit pas de danger la chose *etent* tout naturell j'ay volue vous epargner le deplaisir que vous auroit naturellement Coute d'etre *instruet* des maux que le petit *soufroit* scachant bien combien ... es parents sont plus facilement *allarme* de *loign* plus que *moy* qui les voit tores les jours et *accoutume* a *leures* peines. Scache donc monsieur que depuis deux jours il *dorm* et mange bien et a repris son *bonne heumeur* naturell je ne puis pas me trop *lover* de la *nourrice* elle est soigneuse et a toutes les *tendres* qu'elle pouvoit avoir possiblement. Sy (sy) L'enfant etoit a elle j'ay lui fait scavoir, que vous *est* informez de son *merit* et L'assure qu'-elle sera bien recom-pence come j'ay trouvois par votre derniere que ma silence plus longe qu'a l'*ordinair* vous a *donne* de la peine je ne *manqueroi* pas a l'avenir d'ecrir plus souvent etant monsieur

Votres tres humble et tres obeysent *Serviture*,

PIER LA MARRE.

Folded and addressed thus :

A Monsieur Monsieur Stewart,  
*Gentilhomme Ecossois a Rheims  
en Champagne.*

No. II.

*Paris, Septemb. 18ieme 1749.*

MONSIEUR,

J'ay reçue l'honneur de la votre du dixieme *courant* et selon votre desir *ayent examine* et bien *considere* l'etat de la sante du votre cher Enfant aussi bien que celle de la *nourrice*. J'ay trouvois a *propost* de *severer* l'enfant il ne *fant* pas vous etonner s'il a *ete* un peu *incomode*. Sur le changement du diete c'est a *quoy* je m'at-tendois, il a eu une petite espece de fiever, que n'a dure que trois jours a present il mange et dort bien. J'ay lui *ay* fait prendre de la Ruebarb ce qui a eu le *melliever* effect imaginable, et selon toute aparence, il est a present hors du danger des tout suit de l'*assever-*ment, J'ay toujours *trouve* la *nourrice* si soigneuse que J'ay *juge* a *propost* de continuer enfant entre ses mains scachant que *personne*

ne peut avoir une plus tendre soin. Je suis tres PERSWADE que vous serez tres satisfait en le voyent. Ce que vous nous fait esperer sera bientot, en attendant cette *honeur monsieur* J'ay celle d'etre avec respect, votre tres humble et tres obeysent Serviture,

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PEIR LA MARR.

A Monsieur Monsieur Stewart,  
Gentilhome Ecossois a Rheims  
en Champagne.

## No. III.

Paris, Octb<sup>r</sup>. 4iem 1749.

MONSIEUR,

J'ay bien de plaisir de vous apprendre que monsieur votre *fil* depuis le dernier dents q'u il a *pousse* qui lui avoit *cause* tant de douleurs a repri de la force tellement que l'on ni le reconnoitrait pas Enfin pour tout dire il est a present autant *avance* qu' ill est possible de voir un Enfant de son age vous serez bien *agreeablement* surpris en le voyent il marche it rien ne lui mang... la langue *le* soins de la *nourice* ne...J'ammays etre trop recompensé J'ay l'honneur monsieur d'etre respectueusement

Votre tres humble et tres obeysent Serviture,

PEIR LA MARR.

A Monsieur Monsieur Stewart,  
Gentilhome Ecossois a Rheims  
en Champagne.

## No. IV.

Paris, Jain le 9ieme 1752.

MONSIEUR,

J'ay reçut la coke *ili a quelque temps* par la quille Je suis bien aise *d'apprendre* que les freres Jumaux dont J'avois le bon *heur d'heureusement* accoucher Madam votre chere epouse 10ieme Juliet 1748. Se portent bien, sar tout le Cadet Sholto Thomas pour qui il y avoit tant *a craindre etoui venne* an monde se foible, que j'etois oblige—de suir aussi la fonction du pretre decraint qu il auroit parti pour l'autre monde sans citte ceremonie si essentiel je vous prie de vouluir fair mes tres *humble* compliments a Madame Stewart votre tres chere epouse et a Madamoyselle Huitte mon assistente, et d'etre *perswade* Monsieur que j'ay l'honour d'entre.

Votre tres humble et tres obeysent Serviteur,

PEIR LA MARR.

P.S.—Depuis votre d'epart, J'ay fait le tour d'italy et une Sejour du dix mois a Naples, qui m'a fait beacoup de bien au poetrin et J'ay trovvois l'air sulphereux de Naples si balsamique en me soulagent le poitren qui Je suis *determine* d'y retourner bientot Je n'attend que l'ocasion favorable d'e trouver un *amy* pour m'accompagner dans le voyage.

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Cette *letter* vous sera livre par Monsieur du Bois, mon amy intime qui vas s'établir a Londre, pour peindre en migniature si vous pouvex lui aider a trouver d'emplois. Vous me ferez Monsieur une plaisir sensible.

A Mousieur Monsieur  
le Collnl. Stewart, a  
Londre.

*Translation.*

No. I.

*Paris, Augt. 26, 1749.*

SIR,

You will be perhaps surprised, and even angry, that I have so long deferred to give you news of your dear child, who, thank God, is very well at present; but for some time past he has suffered much in cutting his teeth, which hindered him to sleep, and put him in a very bad humour. As I was persuaded that there was no danger, the thing being quite natural, I was willing to spare you the uneasiness which it would have naturally cost you to be informed of the pains which the little one suffered, knowing well how much parents are more easily alarmed at a distance, more than I who see them every day, and am accustomed to their distresses. Know then, Sir, that for these two days past he sleeps and eats well, and has recovered his natural good humour. I cannot too much commend the nurse; she is careful, and has all the tenderness which she could possibly have if the child was her own. I have let her know that you are informed of her merit, and assured her that she shall be well recompensed. As I have found by your last that my silence, which was longer than ordinary, had given you uneasiness, I shall not fail for the future to write more frequently, being, Sir, your most humble and most obedient Servant,

PIER LA MARR.

To Mr. Stewart, a Scotch Gentleman,  
at Rheims, in Champagne.

No. II.

*Paris, Sept. 18, 1749.*

SIR,

I received the honour of yours of the 10th current, and, according to your desire, having examined and well considered the state of the health of your dear child, as well as that of the nurse, I found it proper to wean the child: You must not be surprised if he was put a little out of order by the change of diet; it is what I expected. He has had a little sort of fever, which lasted only three days; at present he eats and sleeps well. I caused him take a little

rhubarb, which has had the best effect imaginable; and, according to all appearance, he is at present out of danger of all the consequences of the weaning. I have always found the nurse so careful, that I judged it proper to continue the child in her hands, knowing that nobody could have a more tender care. I am much persuaded that you will be quite satisfied on seeing him, which you make me hope will be soon. Expecting which honour, Sir, I have that of being, with respect, your most humble and most obedient Servant,

PIER LA MARR.

To Mr. Stewart, a Scotch Gentleman,  
at Rheims in Champagne.

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No. III.

*Paris, October 4, 1749.*

SIR,

It gives me a great deal of pleasure to acquaint you that your son, since the last teeth he got out, which occasioned him so much pain, has recovered strength, so that one would not know him. In a word, to say all, he is at present as much advanced as it is possible to see a child of his age. You will be agreeably surprised on seeing him; he walks, and wants nothing but the tongue. The cares of the nurse can never be too much recompensed. I have the honour to be, Sir, respectfully, your most humble and most obedient Servant,

PIER LA MARR.

To Mr. Stewart, a Scotch Gentleman,  
at Rheims in Champagne.

No. IV.

*Paris, June 9, 1752.*

SIR,

I received yours some time ago, by which I am glad to learn that the twin-brothers, of whom I had the good fortune happily to deliver madam, your dear spouse, on the 10th July 1748, are well, especially the youngest Sholto-Thomas, for whom there was so much to fear, having come into the world so weak, that I was obliged to perform also the office of the priest, lest he should have departed for the other world without that ceremony so essential. I beg you would be pleased to make my most humble compliments to Madam Stewart, your most dear spouse, and to Mademoiselle Hewit, my assistant, and to be persuaded, Sir, that I have the honour to be, your most humble and most obedient Servant,

PIER LA MARR.

P S.—Since your departure, I have made the tour of Italy, and a stay of ten months at Naples, which have done a great deal of good to my breast; and I found the sulphureous air of Naples so

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balsamic in relieving my breast, that I am determined to return thither soon. I only wait the favourable occasion.

This letter will be delivered to you by Monsieur du Bois, my intimate friend, who goes to settle at London to paint in miniature. If you can assist him to find employment, you will do me, Sir, a sensible pleasure.

To Colonel Stewart at London.

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JAMES ARTHUR,	-	-	-	<i>Appellant;</i>
JANET GOURLAY,	-	-	-	<i>Respondent.</i>

House of Lords, 9th March, 1769.

**SEPARATE ALIMENT.**—Where the husband offers to aliment the wife in his own house, but takes lodgings only for her, and does not eat, sleep, or stay in the same house with her. Held, that this is not adherence sufficient to exempt him from liability in a separate alimony.

Action of aliment raised by the wife in the following circumstances:—She had been originally the servant of the appellant, a surgeon, residing at the time in Glasgow; and on their connection coming to the knowledge of the public by her pregnancy, they were privately married by mutual acknowledgment and marriage lines. He left the country immediately thereafter, joined the navy, and having acquired a fortune in India, he returned to Scotland, after ten years absence. On his return, he did not wish to renew the connection; whereupon a declarator of marriage, legitimacy, and adherence, was raised by the respondent, and defended by the appellant, he denying the marriage, but the respondent finally obtained decree in that action, declaring her marriage. The present action was raised for aliment, since the 1st day of July 1757, when he left the country, amounting to £360, and £40 per annum for future aliment. She averred in the summons, that the defender (appellant) refused to adhere to the pursuer's (respondent's) fellowship and society, and discharge the duties incumbent on him as her husband, and that the future yearly aliment was to be payable to her aye and until he adhere to the respondent, and discharge all the duties incumbent upon him as her husband, and likewise the sum of £20, for the yearly maintenance,

education, and upbringing of her child. In defence to this action, it was stated, that the appellant (defender) had refused to adhere; on the contrary, the pursuer's conduct was vexatious, and *contra bonos mores* in this respect, for it was she who would not adhere to his society, as was evidenced and proved by a decree of adherence he had obtained in an action of adherence against her.

That, apart altogether from the extravagant aliment claimed, he had never refused to aliment her in his own house, and that she was not entitled to be almented any other where. To this it was answered, that the action of adherence raised by him, was a mere cloak for other designs,—that both before, and while it was going on, she had repeatedly offered to come and live with him, on condition of his taking up house in a regular way, for her and the family. That, in point of fact, she had, along with her child, left her father's house in Stirling, and come to Edinburgh. That, instead of taking up house, the appellant took a room for her and her daughter, a considerable distance from his own lodging, where, instead of living in her society, he lived by himself. That the reception on this occasion was cold,—that when she offered to salute him, he would not allow it. That during all this time she staid in Edinburgh, he neither eat nor slept with her. That he sent away her child from her, and treated her with severity, and threatened to make her life miserable, and to leave for London, and thence for the East Indies; and therefore that, in these circumstances, she was not bound to adhere while such maltreatment was exercised towards her. The Commissaries, of this date, pro- May 16, 1768.  
nounced this interlocutor,—“ In respect of the defender's  
“ (appellant's) admission, that he did neither sleep, eat, nor  
“ lodge in the same house with the pursuer, during their  
“ joint residence in Edinburgh, in the month of February  
“ last, which continued three or four weeks; finds the de-  
“ fender has not adhered to, or cohabited with the pursuer  
“ in terms of law; and therefore finds the pursuer entitled  
“ to a separate aliment; and, in order to ascertain the  
“ amount thereof, appoints the defender to appear in Court,  
“ against Wednesday, to be examined on the extent of the  
“ funds belonging to him, in terms of the pursuer's refer-  
“ ence.”—To this judgment the Commissary adhered, after  
a reclaiming petition. The appellant thereupon brought the case into the Court of Session by bill of advocation, which

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was refused by the Lord Ordinary. A reclaiming petition was then presented.

The Lords of Session, of this date, "adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The interlocutor of the Commissary is not founded on ill treatment on the part of the husband; for of this there is no proof in the cause, and the appellant has expressly denied every allegation of that sort, and required a proof to be allowed. It is not founded on wilful desertion, for he has obtained in the same Court a decree of adherence against his wife. All that forms the foundation of the interlocutor is, that the appellant has not cohabited with her, because he did not eat, sleep, nor lodge in the same house with her, during the space of three weeks. This cannot in law give her a right to claim a separate aliment; nor did it follow in reasoning, or common sense, that a husband has refused to cohabit with his wife, because, for three weeks, he has neither eat, slept, nor lodged in the same house with her. The interlocutor of the Commissaries is objectionable on another ground. It does not specify definitely how long the aliment is to be given,—whether it is to endure until he return to cohabit with his wife, or otherwise.—It amounts, therefore, to a decree of perpetual separation.

*Pleaded for the Respondent.*—A wife is by law entitled to separate maintenance, if her husband ceases to cohabit with her, or, cohabiting with her, maltreats her. If he voluntarily adheres, *bona fide*, with a serious intention of living with his wife, and enjoying the comforts of the married state, there is no occasion and no room for separate aliment; but if he declines to adhere, or if it appear that he has no serious intention of living with his wife, and enjoying her society; but, on the contrary, shuns and dislikes it, she is entitled to aliment for her own and her child's maintenance. There is no pretext, in the present case, for holding that he had ever any intention of adhering or cohabiting with his wife. On the contrary, the whole facts of the case, as admitted, are sufficient of themselves, without any further proof, to demonstrate a contrary intention. His aversion to her society. His refusal to salute her. His taking away her child from her. His sending her victuals in Edinburgh by a common

street porter. His refusal to perform his matrimonial duties at bed and board,—were sufficient ill-usage and maltreatment, which clearly entitled her to a separate aliment.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed; and it is further ordered, that the appellant do pay to the respondent £200 costs in respect of the said appeal."

For Appellant, *Ja. Montgomery, Al. Wedderburn.*

For Respondent, *C. Yorke, H. Dalrymple, Hay Campbell.*

Not reported in Court of Session.

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SIR JOHN DOUGLASS, Bart.,	-	-	<i>Appellant;</i>
HUGH DALRYMPLE, &c.	-	-	<i>Respondents.</i>

House of Lords, 26th Jan. 1770.

**ABSOLUTE DISPOSITION—TRUST.**—A party disposed certain lands to his agent, in order, as he stated, to qualify him to vote in the county election, but held no written obligation under his hand to redispone. Held that the absolute disposition, together with the law agent's accounts, amounting to £1400 due him, foreclosed all idea of trust, unless this were proved by writing under the trustee's hand, in terms of the act 1696.

Action of reduction was brought by the appellant, to set aside a conveyance, or absolute disposition, granted by him in favour of Robert Dalrymple, on the ground, that it was merely granted in trust, and that he ought to be ordained to reconvey the same to him. The allegation set forth in the summons was, that having stood as a candidate for the county of Dumfries, he granted this conveyance to Dalrymple, who was his own agent, for the mere purpose of qualifying him to vote at the election,—that the price mentioned therein, £920, was never paid to him, and would have been a price quite inadequate to the value of the lands. To this the defence was stated, that the disposition was not granted in trust, for the purpose specified, but in payment of his business accounts.—That the defendant, Dalrymple, had acted

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as the appellant's law agent in several legal businesses. That Sir John being embarrassed for want of means, he was obliged to advance money from time to time, as well as to become security otherwise for him, and that prior to granting the disposition in question, Sir John was owing him a sum of £1400, conform to an account docqueted by him. The disposition, therefore, was taken *pro tanto* of said debt. But, further, there was an agreement in existence, in regard to the conveyance of these lands, which totally excluded the idea of a trust, and separately, that the act 1696, whereby no action of declarator of trust lies as to any deed of trust, except the trust be declared in writing, signed by the trustee, was a sufficient answer to the action.

Feb. 17, 1761.

Jan. 3, 1762. The Lord Ordinary and the Court successively repelled

July 4, 1764. the reasons of reduction. And against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—Though, from the nature of the proceedings, the appellant is excluded from proving, that the lands in question were originally conveyed by him to Dalrymple, otherwise than for a *bona fide* price at a common sale; yet the real purpose for which they were conveyed, appears very strongly from a combination of undeniable circumstances. The appellant, when he conveyed the estate, although indebted to Dalrymple in a sum beyond the price in the conveyance, yet continued for a year thereafter to possess the estate, by uplifting the rents thereof; and this was evidence itself of the trust. Also, the price named in the disposition, being far inferior to its value, and the passing that price into the account between the parties. But even supposing Dalrymple's purchase was real, yet, as by the subsequent agreement, the appellant was to have the lands recognized, on payment of the sum there stipulated, he ought to have restitution of the same.

*Pleaded for the Respondents.*—By the statute 1696, no disposition of lands appearing *ex facie* absolute, shall be construed as held in trust, unless the said trust shall be established by a writing under the hand of the disponee. Writing under the hand of the trustee is the only method of instructing such trust, but the appellant having adduced no such writing whatever, the allegation of trust cannot be listened to. Even if a trust could be inferred from circumstances, then it will be found that the present case is totally devoid of any such circumstances. If the estate had been sold merely to furnish the respondent with a qualification to

vote, neither so much land, nor so much price, would have been stated, as neither of these was necessary for that purpose. Neither would he, had this been the character of the transaction, have docqueted an account twelve years thereafter, in which credit was given him for the (£950) price, nor entered into the agreement, which, from beginning to end, supposes the disposition a *bona fide* sale.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed; and it is further ordered that the appellant do pay to the respondent £100 costs.

For Appellant, *Al. Wedderburn, Al. Forrester.*

For Respondents, *C. Yorke, H. Dalrymple.*

*Note.—Unreported in Court of Session.*

Dr. ANDREW HERON,	-	-	<i>Appellant;</i>
JOHN VINING HERON,	-	-	<i>Respondent.</i>

House of Lords, 31st January 1770.

SUCCESSION—DEED—IMPLIED REVOCATION.—A father executed a settlement in form of an entail, in favour of his eldest son, and his heirs-male; whom failing, to his second son and his heirs-male, &c., but reserved power and faculty to himself to affect or burden the fee of the lands: Held that he was entitled to execute a subsequent disposition of the estate in favour of his second son, passing over the eldest son; reversing the judgment of the Court of Session.

ANDREW HERON of Bargaly, in the county of Wigton, had two sons, Andrew and Patrick; Andrew, the eldest, he disinherited, by the deed after mentioned. Captain Patrick Heron, the second son, was married to a Miss Vining, only child of Mr. Vining in Hampshire, with whom he inherited a large fortune. Of this marriage there were two sons, of whom John Vining Heron, the respondent, was the eldest, and Dr. Andrew, the appellant, the second eldest. The present competition arose between these two brothers for the estate of Bargaly, left by their grandfather. The question between them depended on the effect of certain deeds executed by the grandfather. Of this date, a disposition Jan. 24, 1715 was executed by him, disposing his estate in the shape of an entail, "to Andrew Heron, his eldest son, and the heirs-

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" male of his body; whom failing, to Patrick, his second son, and the heirs-male of his body; whom failing, to the second son of Patrick Heron of Heron (his nephew), if he should have any; whom failing, to his eldest son; whom failing, to Jean Heron, the granter's only daughter, and the heirs-male of her body." It contained prohibitions against alienating the lands or woods, and contracting debts, and contained the usual irritant clauses. But it reserved power and faculty to the granter to affect and burden the fee of the lands with what sums of money and annuities he should

1716. think fit, at any time in his life. He thereafter revoked this deed, and of new executed a new deed, disponing the estate to the same series of heirs, but reserved to himself power to sell, annailzie, or to contract debt. Some years after

Jan. 24, 1726. this, and of this date, the grandfather was pleased to change the above destination of his estate; and, conceiving that his eldest son, from his marriage, was undeserving of his favour, he executed a disposition in the following terms:—"Forasmuch as Captain Patrick Heron, my (second) son, is to relieve me of the sum of £920 sterling, due by me to Patrick Heron of that ilk (my nephew), and for which sum the said Patrick hath an heritable security upon the lands of Bargaly and others, the which sum extends to 19 years' purchase of said lands, upon payment of which the said Patrick Heron is to denude himself of all right to the lands: Therefore, to have sold, annailzied, and disponed to and in favour of the said Captain Patrick Heron, my son, in liferent, and to Andrew Heron, his second lawful son, in fee; which failing, to any other of his sons he shall think fit, heritably and irredeemably," the lands of Bargaly, reserving his own and his wife's liferent. Two years afterwards, and of this date, this disposition was altered so far as to give the fee, in place of the liferent, to Patrick, the father, and the succession to his second son Andrew, the appellant.

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The appellant, then coming to the knowledge of his rights, which were concealed from him by the respondent, entered appearance in the action brought against the nephew, (who, in the meantime, had taken possession of the estate under his bond,) and claimed under the deed of 1726, executed by his grandfather, which conveyed the estate of Bargaly to Captain Patrick Heron in liferent, and his second son, the appellant, in fee, contending that the deed of 1715, executed by the grandfather, and under which the respondent

claimed, was never a delivered deed, and was subsequently revoked by him. The respondent, on the other hand, contended that he was the heir-male entitled to take under the deed 1715, Andrew Heron, the substitute, having died without male issue. And the grandfather having been denuded of his estate by this deed of entail, and being restrained from making any settlement prejudicial thereto, had no power thereafter to execute the deed of 1726, conveying the same estate to his second son, Captain Patrick, and second grandson, the appellant, and therefore that this deed, with the one relative thereto in 1728, was null and void. The Lord Ordinary, of this date, "preferred the said Nov. 30, 1764. "Doctor Heron (the appellant), on his interest produced."

On representations, the Lord Ordinary adhered. But on Jan. 21, 1766. reclaiming petition, the Lords, with much division of opinion, of this date, altered and found, "in respect the June 24, — "transaction between Andrew Heron of Bargaly and his "son Patrick was not completed, therefore find that the "deeds 1726 and 1728 cannot be the rule of succession to "said estate. Find that the petitioner (respondent) has "the preferable right thereto in competition with Doctor "Heron (appellant), and remit to the Lord Ordinary in the "cause to proceed accordingly." The appellant reclaimed against this interlocutor, but the Court, of this date, ad- Nov. 28, 1767. bered. And it was against these two interlocutors that he now appealed.

*Pledged for the Appellant.*—As the only debt or encumbrance on the estate was that due to Patrick Heron, the grandfather's nephew, and as it has now been extinguished by perception of the fruits had by his possession, the only question that remains is, which of the two brothers, the deceased's grandsons, has best right to the estate? The reason is clear and obvious for preferring the appellant, the second son of Captain Patrick, to his eldest brother, the respondent, because that brother was the heir richly provided for by the estate coming to him through his father and mother. This gives at once a reason and foundation for the deeds 1726 and 1728, and opens up a favourable view in support of these deeds. There can be no doubt that men may dispose of their property at pleasure, either with or without valuable consideration; and, therefore, it was wrong in the Court of Session to hold that the deeds 1726 and 1728 were ineffectual and incomplete, for want of consideration, in consequence of the condition on which they were

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granted not being complied with, namely, the payment by Captain Patrick Heron of the nephew's debt of £950, because there was no room for applying that doctrine in this case; but the deeds in question fell to be considered as voluntary conveyances on the part of the grandfather, not depending for their validity upon any valuable consideration, but to be judged of, especially *inter conjunctos personas*, as deeds settling the succession to the deceased's estate. The interlocutor of the Court is plainly founded on the non-payment by Captain Heron of this debt. It states that the transaction was incomplete, in consequence of this non-payment; but it did not follow from non-payment that the deeds were thereby invalid, ineffectual, or incomplete. Though they contain a recital that Captain Heron had agreed to pay, upon the nephew's denuding himself of all right on the lands, yet the estate given was absolute, depending upon no such payment, or time of payment. It was further clear that the grandfather's real intention was, to settle a separate representation of his own name and family on the appellant, his second grandson, passing by the respondent. And no letters or correspondence, such as has been adduced, are admissible as against the clear intention afforded by the deeds themselves, otherwise these imperfect writings might be receiveable, to overthrow the most solemn deed ever executed. As these deeds, therefore, were never recalled or revoked, they must be taken to contain his last will and intention in regard to his estate, executed *mortis causa*, and with a view to settle his succession at death. That he had power to execute these is beyond all doubt, because the deed of 1715, on which the respondent founds, was never a delivered deed, and was revoked by the deed of 1716, by which the grandfather reserves full faculty and power to sell, contract debts, or do every other thing that he might have done before granting thereof.

*Pleaded for the Respondent.*—The respondent, as heir-male of his grandfather, and heir to his father, Captain Patrick Heron, has a preferable right to the appellant, his younger brother, to the estate of Bargaly, in terms of the deed 1715. The appellant's only claim rests on the two deeds of 1726 and 1728. In regard to the first, no evidence exists to shew that it was accepted of by Captain Patrick. Indeed, the contrary is presumable; because the terms thereof were so disadvantageous, as compared with the deed of 1715, which gave him the fee in place of the liferent, as at once to

prove, when read with the deed of 1728, which professes to rectify this discrepancy, that *that* deed was rejected. The deed, besides, was merely conditional, and only to take place on the son's making payment of £950 to the grandfather's nephew. With regard again to the deed of 1728, the deed itself is not produced, but only a scroll; but even if extant, this disposition was also conditional; and from the correspondence produced, it was evident that the parties themselves viewed it in that light. Such therefore being the nature and circumstances of the transactions 1726 and 1728, and such the sense of the parties at the time, nothing can be more iniquitous than the attempt now made by the appellant, after the acquiescence of his father for more than forty years. The title of the respondent is indisputable under the deed of 1715, by which his father, Captain Patrick, became entitled to the estate under an absolute and irrevocable conveyance to him, and the *heirs male of his body*, with express obligation and warranty against any other deed or disposition, in prejudice thereof. After this absolute conveyance and warranty, the grandfather had no right or power to make any subsequent disposition of the estate, conveying it away to another. On these grounds, the deeds 1726 and 1728 are absolutely null and void.

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After hearing counsel, it was declared that the deed of the 4th of January 1726 was a complete and effectual disposition and settlement of the estate of Bargaly by Andrew Heron, and it is therefore ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellant, *C. Yorke, H. Dalrymple.*

For Respondent, *Al. Wedderburn, Tho. Lockhart.*

*Note.—Unreported.*

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JOHN CAMPBELL of Ottar, - - - Appellant;  
ALEXANDER CAMPBELL, and WILLIAM WILSON, Respondents.

House of Lords, 10th Feb. 1770.

POSITIVE PRESCRIPTION—INTERRUPTION OF Do.—Citation in summons of exhibition *ad deliberandum*, does it interrupt? Disability by forfeiture is no *non valentia agere*. In counting deduc-

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tion on account of minorities, the time within which a posthumous child is in the *utero* is not to be counted. The prescriptive possession is not to be affected by jointures or liferents on part of the estate at the time he acquired right to the same, if the whole lands life-rented are conveyed to him, and possession had otherwise.

1678.

Colin Campbell, the appellant's grandfather, purchased in the year 1678 the estate of Ottar from the Earl of Argyle, and he and his descendants had ever since possessed the same as absolute owners under feudal titles.

In the present action, a claim was made to dispossess the appellant of the estate, by the respondent Campbell, stating himself to be a descendant of a family who were owners of the estate before the Earl of Argyle became proprietor, and from whom it was alleged to have been apprised for debts far below its value.

1651.

The proprietor of Ottar before the Earl of Argyle was a Colin Campbell, who died in 1620, leaving Archibald, Colin, and other sons. Archibald, the eldest, who succeeded his father, married Ann Stirling, and by marriage contract settled the estate of Ottar, holden of the family of Argyle, and the lands of Evenachan holden of Lamont, upon his *heirs male*, charged with provisions for daughters, and a liferent locality or jointure to his wife Ann Stirling. He died in 1651, leaving issue one daughter, Jane Campbell.

1659.

The estate being limited to heirs male, then descended to his younger brother Colin, who was infest in 1659. When Colin Campbell came to possess the estate, he was much in debt, and the estate itself was already charged with debts which he was unable to clear off. Jane Campbell and her husband, along with her mother, Ann Stirling, or William Stirling her assignee, had concurred in apprising of the estate of Ottar and Evenachan for the daughter's portion, consisting of £277. 15s. 6d., and for £122. 4s. 3d. for aliments.

June, 1663.

Upon these a charter of apprising was obtained from the Crown, (the superior, the Earl of Argyle being under attainer), and upon this infestment was taken. Jane thereafter had sold and conveyed to her Ann Stirling's right and interest in the above apprising, by her brother and assignee William Stirling; which apprising, unless redeemed and satisfied within the legal or ten years, gave her in law an absolute property in the estate.

1672.

The apprising of Jane Campbell was never redeemed by Colin Campbell. He died without issue before the year

1672, and was succeeded by his younger brother Patrick, who made up titles to Evenachan and Darmacherichbeg, but never to Ottar, nor did he ever take up possession of that estate. 1770.

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In this year, Jane Campbell conveyed to the appellant's author, the Earl of Argyle, all the lands contained in the apprising, assigning to him all the decrees, charters, and other relative writings, together with the rents, mails, farms, kains, and customs of the hail lands. This disposition, which was granted in consideration of the Earl conveying to Jane the lands of Stronderer and Stronwhilling, contained a procuratory of *resignation ad remenantiam*, whereby the lands of Ottar were resigned into the hands of the Earl, as superior, of this date, and instrument recorded on the 1st June May 20, 1674. thereafter.

In virtue of these wadsets, Jane Campbell had entered into possession of the estate of Ottar, previous to her sale to the Earl. And the Earl himself had entered into possession, by uplifting the feu-duties and rents of the estate, as was proved by the rental books of the Argyle estates. The Earl then conveyed to the appellant's grandfather for a price immediately paid. In this disposition there is an exception in the assignment of the rents, mails, and duties, applicable to the lands over which Ann Stirling's liferent extended, viz. Largiebeg, Largiemore, Kilfail, and the lands of Corra. No infestment followed upon this conveyance, but in implement of it a charter was granted by the Earl, on which infestment followed, and in which there was an exception in the warrance clause of Ann Stirling's jointure.

In virtue of these writs and titles, Colin Campbell the purchaser, and appellant's grandfather, entered into immediate possession of *all* the lands of the estate, with the exception of those held by Ann Stirling in jointure. He also soon thereafter obtained possession of the jointure lands, by a transaction in which she assigned him her liferent right.

The appellant therefore stated the defence to this action, that, in virtue of these two distinct titles—the disposition to the property of the whole, and assignation of the liferent, and the possession had upon them for more than double the prescriptive period, the pursuer totally excluded by the statute 1617, and that he might ascribe his prescriptive possession to either title.

The respondent replied, that, by minorities and forfeitures in his family, which were allowed as deductions from the

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years of prescriptive possession, reduced it to a period of 39 years and 5 months and 24 hours, and so within the prescriptive period. The Court allowed a proof, the one of prescriptive possession, the other of interruption thereof. Of the interruption proof was led of, 1st, Minorities ; 2d, Forfeitures ; and, 3d, Citation on Summons of Exhibition *ad deliberandum*.

Dec. 20, 1765. The Court, of this date, pronounced this interlocutor,

" Find that the titles produced for the defenders, with the possession following thereon, are sufficient to exclude the pursuer from the subjects under challenge, and therefore asoilzie the defenders (appellants)."

The respondent reclaimed, contending that the possession of the appellant's ancestor had not been total from the date of his purchase, the liferentrix being in possession of certain parts of the estate, viz. of Argadden and of Largiebeg, Largiemore, down to the year 1691 ; and, therefore, these were sufficient to interrupt and exclude the possession under the statute 1617.

After considering the argument on this point, the Court, Aug. 7, 1766. of this date, " Find that the defender has produced sufficiently to exclude the pursuer's title, in so far as concerns the lands of Argadden, which were liferented by Mary Campbell, and in so far they adhere to their former interlocutor, and refuse the desire of the petition ; but find the defender has not produced sufficiently to exclude the pursuer's title, in so far as concerns the lands of Largiebeg and Largiemore, the lands of Kilfail, and the just and equal half of the lands of Corra, which were liferented by Ann Stirling, and remit to Lord Auchinleck, this week's Ordinary on the Bills, to proceed." And on reclaiming Feb. 18, 1767. petition, the Court adhered.

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellant.*—The appellant's ancestors purchased *bona fide* the estate of Ottar at its full value, and have possessed it unchallenged, for a period of nearly 89 years, more than double the number of years required by the statute 1617, to quiet the mind of every proprietor of land. The respondent's ancestors, if such they were, had been divested even prior to that period by apprising creditors, who at the expiry of the legal term of redemption, became owners, and might and did dispose of the estate. Jane Campbell and William Stirling apprised the estate, and obtained charter and infestment thereon in 1663, from which time, if necessary, the prescriptive right might be maintained

to commence. They in 1672 assigned their whole interest to the Earl of Argyle, the superior, who bought up other debts affecting the estate, and on 20th May 1674, resigned the lands to him in property, whereby the property and superiority became consolidated ; and from this period, the said Earl and the appellant, as now in his right, had right to the benefit of prescription, founded on possession on the part of Jane Campbell, by her uplifting the rents. Then the appellant's grandfather purchased the estate from the Earl in 1678, and he and his ancestors have possessed from that date, down to the raising of the present action in 1759, without challenge.

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The respondents admit the prescription to have run from 9th April 1678, and likewise admitted that possession followed upon this disposition on the part of the appellant's grandfather, with the exception of the jointure lands. But there is sufficient evidence also of his having afterwards acquired possession of the jointure lands, under a valid assignation to the liferent right. In 1687 M'Lean and Ann Campbell, as possessors of the whole estate of Ottar, gave up to the Government Commissioners of Valuation the valuation thereof, as possessed by them, which could not have been the case had Ann Stirling still continued to possess her jointure lands.

The deductions claimed in respect of the minorities are not founded on the statute 1617 ; the deductions directed by that statute having reference to the negative prescription alone. The same cannot be here pleaded to the positive. But even supposing it could, the minority of Neil Campbell is not made out. Instead of being 15 years of age in 1690, it is brought out in evidence that he must have been 30 or 40 years. Alexander the writer, his posthumous son, for whom is claimed a deduction of 21 years and *seven months*, can be entitled to no more than his years of minority (21 years), and not to the seven months during which he was in his mother's womb *in esse*. And as to Neil Campbell's *forfeiture*, there is no ground in law for any deduction on that account. Looking, therefore, to the proofs of possession, which, for so ancient a period, are as satisfactory as well can be expected, it ought to be held sufficient to sustain the prescriptive title now pleaded in bar of the present action.

*Plead for the Respondent.*—The title of the respondent to the estate of Ottar, if not barred by prescription, is clear

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**CAMPBELL  
v.  
CAMPBELL, &c.**

and certain. It is to be kept in view, that prescription is always an unfavourable, sometimes a very ungracious plea; for however expedient it may be to settle the tenure of property, by discouraging old and antiquated claims, when the evidence for rebutting them have disappeared, or been laid aside, yet it is manifest the claims of those who have been unlawfully deprived, are not therefore to be utterly silenced. In all cases, therefore, law and equity will judge strictly of the title necessary to constitute such a plea, ere it totally shut out the claimant. If, therefore, there be any defect in the title necessary to constitute this prescriptive right, this will be availing. And as the possession here, which is a requisite of the statute, has not been complete, it follows the title cannot be pleaded. It is a bar to such plea, that the respondent's ancestors were *non valentia agere*; or disabled from possession, and therefore minority and forfeitures ought to be deducted. As to those lands possessed in jointure, prescription cannot apply, according to the Roman law *tantum prescriptum quantum possessum*; and the evidence by which the appellant has attempted to prove that neither of these liferents were in continuance after 1768 is entirely inconclusive; whereas the respondent has adduced satisfactory evidence of the continuance of these liferents down to so late a period as must necessarily deprive the appellant of the number of years necessary to complete prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of 7th August 1766, and 18th February 1767, complained of in the original appeal be reversed; and that the interlocutors and parts of interlocutors complained of in the cross appeal be affirmed.

For Appellant, *Jas. Montgomery, Al. Forrester.*

For Respondents, *Al. Wedderburn, Tho. Flockhart.*

Vide 5 Brown, Sup. 917.

*Note.*—It is not noticed that this case was reversed in the House of Lords by Professor Bell, vide Principles, § 625. Illustrations, vol. I. pp. 365 et 372; vol. II. p. 54. Vide Napier's Com. on Prescription for strictures on this case, p. 176, et seq. Mr. Napier says, without giving any authority, that the House of Lords “went ~~not~~ against the doctrine that the possession of the liferenter *cannot be reckoned* in a course of prescription, but merely determined that where a party produces a charter and sasine, followed by forty years uninterrupted possession of the whole estate *ex facie* embraced by those titles, he produces a title exclusive of such enquiries.”

KATHERINE SINCLAIR and Trustee; and HEN-  
RIETTA JANET, EMILIA and MARGARET SIN- }  
CLAIR, infants, and JAMES SINCLAIR, their }  
Administrator at Law, - - - - - } *Appellants; SINCLAIRS, &c.*  
DAVID THRIEPLAND SINCLAIR, Esq., an infant, }  
and STEWART THRIEPLAND, his Administra- }  
tor at Law, - - - - - } *Respondents  
v.  
SINCLAIR, &c.*

House of Lords, 13th February 1770.

PROVISION—DISCHARGE BY ONE CHILD OF SHARE OF CONQUEST—HOW IT OPERATES AS TO THE OTHER CHILDREN.—  
The bonds of provision fell under the father's powers of distribution, and therefore effectual to bar the children from further claim, if these were accepted by them, but not otherwise: and that Katherine was not bound to accept of her bond of provision.

In 1714 Mr. David Sinclair of Southdun married Lady Janet Sinclair, and executed in 1716 a deed of settlement, settling Southdun "upon Lady Janet for life, and the heirs "male or female of the marriage in fee." By this marriage there was a son and three daughters, who all died without issue except Janet, who left a son, the respondent, David Thriepland Sinclair.

After Lady Janet's decease, David Sinclair married a second time, and entered into marriage articles, by which he "became bound and obliged to settle and secure the sum of 10,000 merks Scots, (£555. 11s. 1½d. Sterling), and whatever lands, heritages, sums of money, or others whatsoever he should happen to conquest or acquire during the marriage, the one half to the said Marjory Dunbar in liferent, and the whole to the children of the marriage in fee; to be divided amongst them by the said David Sinclair." Of this marriage there were two daughters, Marjory, who died leaving issue, and the appellant Katherine.

During this second marriage, David Sinclair acquired, by purchases and mortgages, considerable estates in land and houses.

Marjory, his eldest daughter, married John Dunbar, and upon his death without issue, she married James Sinclair of Harpsdale, with whom she had four children, who appear as appellants in this action, as representing their mother.

David Sinclair, the father, when his daughter Marjory married John Dunbar, became a party to their contract of

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marriage, by which he, on his part, became bound to pay Sir Patrick Dunbar, the bridegroom's father, in name of to-  
SINCLAIRS, &c. cher or portion, and as her share of the conquest, the sum  
v. of 10,000 merks (£555. 11s. 1½d. Sterling) at the term  
SINCLAIR, &c. therein limited. This deed was signed by the whole three parties.

1756.

On his wife's death he executed a bond of provision in favour of Katherine Sinclair, his other daughter, obliging himself to pay her and her executors or assigns £1000 Sterling, at the first term of Whitsunday or Martinmas after his decease, " declaring the same to be accepted of by the said Katherine Sinclair in consideration and *full satisfaction to her of her share* of the said provisions granted by him in his contract of marriage in favour of the daughters of that marriage, failing heirs *male*; and in consideration and full satisfaction to her of her share of the provisions of conquest, or lands, heritages and others whatsoever, which should be acquired during the marriage, granted by him in favour of the daughters of the said marriage, failing heirs male; and in consideration and full satisfaction of the said Katherine, her portion natural, bairns part of gear, share of moveables, legitim, or other pretensions whatsoever."

1757.

In like manner, he executed a bond of provision in favour of his daughter Marjory of 8000 merks (£444. Sterling) payable at the first term after his death, which sum of 8000 merks, together with the 10,000 merks formerly paid to her, was to be accepted of by her in full satisfaction of all claim in the marriage contract, precisely in the same terms as the above clause. This bond was never delivered to, nor accepted by Marjory.

David Sinclair, after having married a third time, died in 1760, leaving a daughter of this marriage, with a provision to her, under the marriage articles, of £1000.

Mutual actions were brought by David Thriepland Sinclair, the only descendant of the first marriage, against Katherine Sinclair, and the children of her deceased sister Marjory, and by them against the former; which actions being conjoined, the questions involved and raised were, 1st, Whether the oldest daughter Marjory had, by her marriage contract in 1748, effectually released all claim of conquest under her father and mother's marriage articles; 2dly, Whether Katherine has also discharged her claim to conquest by the bond of provision in her favour: 3dly, Suppos-

ing Marjory barred, and Katherine not, whether Marjory's exclusion entitled Katherine to the whole provision contained in the marriage contract of conquest, or whether the benefit of Marjory's release and satisfaction operated in favour of the father by way of discharge or assignment of her share.

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SINCLAIRS, &c.  
v.

SINCLAIR, &amp;c.

After various procedure, the Lord Ordinary, of this date, pronounced the following interlocutor :—“ Having considered the debate, with the several writings therein referred to, finds that Mrs. Marjory and Katherine Sinclair, the pursuers' cedents, having been the only children of the marriage between David Sinclair of Southdun and Marjory Dunbar, were entitled to *full implement* of the provisions to the children of that marriage, in terms of the marriage articles between their parents, viz. 10,000 merks, and *the whole that should be conquest* during the marriage, the conquest being declared to be what Southdun (i. e. David Sinclair) should leave at the dissolution of it, over and above the land estate he was then possessed of, and after payment of all debts, as was then owing, or should be owing at the dissolution of the marriage; but finds that neither of these daughters was entitled to the foresaid provision, in respect the father, by the conception of the contract of marriage, *had the power of division*; and, therefore, finds that, though in his daughter Marjory's contract of marriage, he settled 10,000 merks upon her as her share of the conquest, which was effectual to cut out Marjory and her heirs, who behoved to rest satisfied with the division he made, *he still continued bound* to make good the provisions to the other heir of the marriage, Katherine, so far as Marjory's share had not exhausted them.” On representation, the Lord Ordinary adhered “ to the former interlocutor, so far as it finds the

Mar. 10, —

sums advanced to Marjory do not preclude Katherine from claiming *effectual implement* of the obligation for conquest, in so far as not implemented: And farther, having considered the condescendence for the defenders (respondents) and Katherine Sinclair's answers; and more particularly having considered that it is an agreed fact that Katherine Sinclair, at the time of the alleged transaction, was living in family with her father; that there is no deed under her hand renouncing her claim on her mother's contract of marriage; that it is not alleged that she, after her father's death, ever made any claim upon this bond,

1770. " or even in her father's life made any claim upon it; finds

SINCLAIRS, &c. " that she is not bound to accept of that bond; and that  
v. " her claim, and the pursuers, in her right, to the conquest,

SINCLAIR, &c. " in terms of her father and mother's contract, remains ef-  
fectual." The respondents preferred a reclaiming peti-  
tion to the whole Court, who pronounced this interlocutor:

Dec. 4, 1767. — " Finds Katherine's acceptance of the bond of provision,  
" granted to her by Southdun, *not instructed*, and that she  
" is not bound to accept of said bond; neither is she obliged  
" to hold the same in satisfaction of her claim of conquest:  
" and in so far adhere to the Lord Ordinary's interlocutor  
" reclaimed against, and refuse the desire of this petition.  
" But before answer, as to the other points in this petition,  
" viz. whether Marjory's renunciation of her share of the  
" conquest must operate a discharge of the one half, and  
" must restrict Katherine's share to the other half, appoints  
" parties to give in memorials thereon *hinc inde*." The first  
part of this interlocutor the respondents acquiesced in as  
to Katherine.

In the memorials ordered on the other point, it was con-  
tended for the respondents, David Thriepland Sinclair, &c.  
that, according to the law of Scotland, marriage-contract pro-  
visions, containing a clause of conquest, made every child of  
that marriage a creditor of the father for an equal share there-  
of, subject, however, to the father's power of distribution.  
That in all cases of debt, the discharge of the debt was a  
discharge of the debtor; and that this rule must equally  
hold in debts arising by provisions of conquest from the fa-  
ther to every child of the marriage, and consequently Mar-  
jory, having discharged her right to the residue of the con-  
quest, the benefit thence arising accrued to the father to the  
extent of one half; the other half going to Katherine.

For Katherine, it was contended that she was entitled to  
the whole, in virtue of the marriage-contract—that the bene-  
fit of the renunciation of her sister's share accrued to her,  
and not to the father;—and that the rule that the discharge  
of the debt is a discharge of the debtor, was not applicable  
to provisions by conquest.

The Court, after much difference of opinion, pronounced  
July 26, 1768. this interlocutor:—" Find that the words Marjory Sinclair's  
" contract of marriage in 1748, import a renunciation and  
" discharge of the half of the conquest provided to her by  
" her father's contract of marriage in 1722, and consequent-  
" ly must restrict her sister Katherine's share of said con-

"quest to the other half; and, therefore, prefers the heirs  
"of line of Southdun to that share of the conquest now in  
"question, which would have fallen to Marjory, if she had  
"not been excluded by her contract of marriage, and de-  
"cern."

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SINCLAIRS, &c.  
v.

Against these interlocutors the present appeal was brought to the House of Lords by Katherine, in so far as her claim was restricted to the half; and by Marjory's children, in so far as it was held that their mother's marriage contract imported a discharge of her claim to conquest. The respondent also appealed, in so far as the above interlocutors found that it was not established that Katherine had accepted her bond of provision.

*Pleaded for the Appellants.*—That there was no ground whatever for maintaining that Katherine had accepted her bond of provision made by her father; or that she was bound in law to accept in satisfaction of the provisions in her father and mother's marriage contract. But this point was foreclosed in consequence of the respondent acquiescing in the unanimous judgment of the Court, and the appeal against it thirteen months after it was pronounced, was now incompetent.

Further, marriage contract provisions do not confer a debt on the children favoured for particular shares, but to the whole of the children, among whom it must be made good. The power of division in the father is merely a right of appointing the shares in which it is to be distributed. This being the nature of marriage provisions, it followed that the WHOLE that has been destined to the children must be good, and go to them, whether there be less or more, and whether in equal or unequal shares; and the father cannot, by contract, composition, or transaction with one, entitle himself to retain any part. The father is but a trustee for the whole children, and so any bargain cannot operate in *his favour*, but only to the beneficiaries under the trust.

Marjory's marriage contract, neither by the words or intent, can bar from her share of the conquest, because there is nothing in that deed, sufficient to exclude it, and a discharge ought not to be raised up against her by mere implication.

*Pleaded for the Respondents.*—In conquest, it is conceded, that the father has the power of division among his children as he thinks proper, at common law, unless he has restrained himself by deed. He may give more to one, and less to an-

1770. other. If, therefore, no distribution be made, the children will take equally, but if a distribution be made in terms of a power reserved, it must be exercised conform to that power.  
—  
*v.* **SINCLAIR, &c.** Here a power was reserved to distribute, only with consent of his wife, and during her life, and this sufficiently restrained him so as only to possess a power to distribute in terms of the deed. The bonds granted to the children were not an exercise of that distribution, and, in point of fact, no distribution ever took place, and, consequently, the two daughters were entitled to an equal share of the conquest. But, as the eldest daughter Majory thought proper to compound with her father, and to accept of a special sum in full satisfaction of all she could claim under the said provision of conquest, her claim was at an end, and her children have now no claim, which is entirely excluded by their mother's acceptance in her marriage contract of a specific sum, in full thereof; and the benefit of that transaction operated in favour of the father, whose discharge was equal to an assignation in his favour of her share.

Then, again, as to Katherine's share, it was clear, from the nature of the whole transaction at the time, that her father, David Sinclair, understood that the bond in her favour was given and accepted of by her in full satisfaction of her share to the conquest. She got the bond into her own hands, she read it, and returned it to Sir Patrick Dunbar. He put it on record, took extracts for her use; and this recording made the deed a regular delivered deed. From all these acts, done with her own knowledge and acquiescence, acceptance of the bond was to be implied.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Appellants, *Al. Forrester, Tho. Lockhart.*

For Respondents, *Ja. Montgomery, Al. Wedderburn.*

*Note.—Not reported in Court of Session Reports.*

ROBERT WADDELL, Esq., Conjunct Principal } *Appellant* ;  
 Clerk of the Bills, - - - - - }  
 CHARLES INGLIS, Deputy Clerk of the Bills, *Respondent*.  
 House of Lords, 14th February 1770.

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 WADDELL  
 v.  
 INGLIS.

**TWO CONJUNCT PRINCIPAL CLERKS OF THE BILLS APPOINTED A DEPUTY TO DISCHARGE THE DUTIES OF THE OFFICE**—Held, on the deaths of both the Principal Clerks who appointed him, that the office of the Deputy did not thereby cease and determine, so as to entitle the new Principal Clerks to appoint other Deputies, or to enter into and perform the office of Deputy by one of their number, and to uplift the fees belonging to the office.

Upon the 23d July 1713, Sir Alexander and Sir Philip Anstruthers, then conjunct Clerks to the Bills, had concurred in granting a commission to Charles Inglis, writer in Edinburgh, the respondent's father, “ nominating and appointing “ him to be their depute, for officiating under them, and “ their successors in office, during his lifetime, in all bills of “ suspension and advocation, to be given in at their office, “ and presented before the Lords of Session, and to receive “ the bonds of cautionary, and uplift the ordinary dues of “ the said bonds of cautionary, and apply the same to his “ own use, and generally to act and do under them, the said “ Alexander and Sir Philip Anstruthers, and their successors “ in the said office of clerkship, in all and every thing as “ James Nicholson, or Henry Oliphant, former deputes, were “ in use to do.”

In 1742 Sir Philip and Mr. David Anstruthers, then conjunct clerks to the bills, renewed this commission in precisely the same terms, to the said Charles Inglis and his son, the respondent, and the survivor of them, to be their clerks depute.

1742.

It appears that this was the first instance of a grant of this nature to two persons, with the benefit of survivorship.

Charles Inglis the father, died in 1747; and thereupon a new commission was granted in the same terms to Charles Inglis, the respondent, by Sir Philip and David Anstruthers.

1747.

In 1749, and on the death of one Cramond, who held office in the bill chamber, another commission was granted to the respondent Charles Inglis, and his brother Laurence, and to the survivor of them, *as their servants in the bill-chamber*.

Upon the resignation and subsequent deaths of the principal clerks of the bills above mentioned, Sir Robert An-

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WADDELL  
v.  
INGLIS.

May 21, 1762. struther and the appellant Robert Waddell, were appointed conjunct principal clerks of the bills. The appellant Waddell, who had been bred to business, resolved, upon his appointment, to attend and discharge in person the duty of that office, which had always for time past memory been performed by deputies. It was alleged that his chief motive for so acting, arose from a conscientious wish to discharge faithfully in person his duties, without delegating these on another, and thereby holding his own appointment as a mere sinecure.

This resolution on his part was communicated to Sir Robert Anstruther his colleague, and with his approval the same was communicated to the respondent Inglis, who objected, and who refused to allow either of the principals to have any concern in the office.

A reduction and declarator was then raised by the appellant Waddell alone, his colleague Sir Robert Anstruther declining to appear as a party, in consequence of the *absolute warrandice* contained in the *deputation*, which his father Sir Philip Anstruther had granted to the respondent, warranting the deputation to stand good, and be effectual to him during all the days of his life; and the respondent, on his part, apprehensive as to the duration of his commission, beyond the deaths of the parties who had granted it, raised a counter action of reduction and declarator, against Sir Robert Anstruther, as representing his father, upon the warrandice above mentioned, which lay aside to abide the result of this action.

The appellant insisted for reduction of the deputation granted to the respondent, by Sir Philip and David Anstruther, on the following grounds: 1st, The same was *ipso jure* null, as flowing from persons who never had power to grant such deputation, because the commission in their own name, bore only a power to them to exercise that office by themselves or servants, but no power for naming deputes for life. 2d, As the appellant, by his commission, is declared answerable for the deputes or servants who officiate in this office, he falls to have the nomination of them while answerable, and, therefore, that no deputation granted by his predecessors was valid, it being contrary to all law and justice that the appellant should be answerable for persons over whom (if such deputation was to stand) he had no power; and, 3dly, All deputations, being of the nature of factories or mandates by law, fall upon the death of the granter, and the granters being now dead, the same has fallen and at an

end. The Lord Ordinary made avizandum to the whole Lords of the whole cause, and ordered parties to lodge informations, which being done, the whole Lords repelled the reasons of reduction, and sustained the defences, and remitted to the Lord Ordinary to proceed accordingly. June 15, 1766. Against this interlocutor the appellant reclaimed by petition; and, upon answer, the Court adhered to their former interlocutor.

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WADDELL  
v.  
INGLIS.

Aug. 1, —

The Court were much divided, six judges were for the appellant, and seven for the respondent. The appellant thereafter proceeded with the declaratory conclusions, namely, to have it found, that notwithstanding the said deputation in favour of the respondent, he had full power and liberty to officiate and exercise, in all and every branch of the business, in the said office, in conjunction with his colleague, and to keep all the records and papers belonging thereto; and that the respondent should only be assistant and subservient to the appellant in such branches of the business as the appellant should commit to him, and entitled to such fees only as were mentioned in the foresaid deputation.

The Lord Ordinary, after various procedure, took the case to report, and informations being lodged for the whole Lords, they found "That the pursuer *in hoc statu* by him - July 27, 1768.

"self, and without the consent of his colleague Sir Robert Anstruther, is not entitled to remove the records, books, bonds, and other writs belonging to the bill-chamber, from the custody of Charles Inglis; but that the same are to remain as formerly. 2. That as, on the one hand, the pursuer (appellant) is entitled to the whole fees, perquisites, and emoluments, which he has been in possession of, as conjunct principal clerk of the bills; so, on the other hand, the defender (respondent) is entitled to the whole fees; perquisites, and emoluments, which he and his predecessors in office, as depute clerk of the bills, have been in use to receive and enjoy, and that the pursuer has no title to intermeddle therewith. But before answer how far the pursuer is entitled to officiate in the bill-chamber along with Charles Inglis, remit to Lord Auchinleck to hear parties farther thereon; and appoint the pursuer to give in to the Ordinary a condescension of the manner of his proposed attendance, and the regulations under which the same is to be given, with power to his Lordship to proceed in the whole cause."

1770.

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**WADDELL**  
v.  
**INGLIS.**

Aug. 9, 1768. "sented, respecting the pursuer's attendance at the bill-chamber, on this express condition that he should be entitled to the just and equal half of the whole profits and emoluments presently payable at the office, they not only recal the former remit to the Ordinary; but further, they assoilzie the defender from the whole conclusions of the pursuer's present process, and decern."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—1. That the deputation of the office of bill-chamber clerk, being merely an appointment of one person to officiate in the place of another, must expire with the death of the principal who appointed the deputy; and, therefore, the respondent, after such death, has no longer right to hold the office under this deputation, which, on that event, ceases, and is at an end. And this is the more necessary, seeing that the nature of the office is one of trust and responsibility attaching to the principal clerks; and in order that they may have proper persons under them, for whom, by the express words of their commission, they are responsible, it is necessary that the nomination and removal of the persons for whom they are so responsible should be in their power. And no previous practice shewing that the depute clerks have been in the custom of holding their appointments after the death of the principal, can go against principle, and the express warrant of the commission.

Each of the principal clerks has a separate and independent commission; and being thereby constituted complete clerk to the bills, must be entitled to maintain such action as is necessary to protect or recover the rights and privileges of his office, and cannot be liable to control by his colleague, except where he abuses the duty of the office.

*Pleaded for the Respondent.*—The appellant being but a joint officer, cannot maintain this action without his colleague. The two grantees make one officer. The respondent has been bred up all his life in the office, having served first under his father, and in the performance of his duty has given general satisfaction. He paid a very large sum for his present commission, on the faith and distinct understanding that he was to hold the appointment for life, as all

his predecessors had done. This commission was regularly recorded in the books of Sederunt, and by an *Act of the Lords of Session he was admitted to the office*. His removal, in these circumstances, would both be unjust to him, and injurious to the public. Besides, the appellant bought his office of principal clerk of the bills, in the full knowledge of existing deputations, terminable only by the respondent's death, and the price paid by him demonstrates that these existing rights entered into the consideration. The appellant may, if he chooses, act and perform duty in the bill-chamber, in any of its departments; but the respondent submits that this cannot be done to the effect of depriving him of any of the fees which he has been accustomed to uplift.

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MILNE, &amp;c.

v.

MAGISTRATES  
OF  
EDINBURGH,  
&c.

After hearing counsel, it was Ordered and adjudged that the appeal be dismissed, and the interlocutors therein complained of be affirmed, and that the appellant do pay to the respondent £100 costs.

For Appellant, *Al. Wedderburn, Tho. Lockhart.*

For Respondent, *J. Montgomery, Al. Forrester.*

*Note.—Unreported in Court of Session Reports. Vide M. 16633, for case which followed.*

WILLIAM MILNE, Architect in Edinburgh, and  
ALEXANDER BROWN, Merchant in Edinburgh, and ROBERT MILNE, Architect in London, his Cautioners,

The MAGISTRATES and TOWN COUNCIL of Edinburgh,

Appellants;

Respondents.

House of Lords, 15th February 1770.

**ARBITRATION CLAUSE—CONTRACT.**—A contract in regard to the execution of the works in building a bridge, contained a clause, referring all differences and disputes to two neutral men of skill, as arbiters to be chosen, and in case of their differing, with power to them to choose an oversman, whose determination was to be final. Held, on a preliminary defence being stated, to a summons raised for failure to implement the contract, founded on this clause, that an agreement to refer all disputes to arbiters, did not bar the present action in this court, and that the plea in this case, was irrelevant and inadmissible.

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MILNE, &c.  
v.MAGISTRATES  
OF  
EDINBURGH,  
&c.

The question in this case arose out of the building of the North Bridge, over what was then called in Edinburgh, the North Loch, at a time when the Magistrates of Edinburgh obtained an act of Parliament for extending the royalty of the city.

The appellant, Milne, in conformity with an amended plan given in by him, was employed to execute that structure, and Brown and Milne, the other appellants, were his cautioners, and a contract was entered into by them binding them to specific performance according to the plan and stipulations therein specially set forth.

In case of dispute as to the execution of the contract, there was a clause referring the same to arbiters, in the following terms:—"That in case any difference shall arise " betwixt them relative to the execution of the work, or the " meaning or intention of these presents, the same shall be " referred to two neutral persons, who shall be tradesmen, " or artists, conversant in such works, with power to them, " in case of variance, to choose an oversman, whose deter- " mination shall be final therein."

After the whole structure was almost completed, the vaults and side walls of the south abutment gave way on 3d of August 1769; whereupon, and in order to satisfy the public, the respondents acquainted the appellant that they proposed calling Mr. Smeaton, and other persons skilled in such works, to give their opinion upon the sufficiency of the bridge: with this the appellant expressed himself satisfied. Messrs. Smeaton, Adam, and Baxter, accordingly gave in their report, stating, that "all heavy buildings were obnoxious to setts; and particularly those, where great weights " are obliged to rest upon small areas of ground; yet we " see buildings stand for ages under these circumstances, " much more in those cases where they can be relieved of the " pressure which originally occasioned those derangements. " *And we must further observe, that though the bridge was to " be taken down, and rebuilt with all the skill in Europe, yet " it could not be insured but that something of this kind " might appear.*"

Notwithstanding this report, the appellant was served with a charge of horning under their contract, purporting to compel them to implement and perform the whole articles preivable by them." A suspension of this charge was brought. And then the respondents brought a summons of declarator, with which the suspension was conjoined. The

appellants stated, among others, the following preliminary defence: that as by the contract, "all differences relative to the execution of the work, or the meaning or intention of the contract, should be referred to neutral persons who shall be tradesmen, or artists conversant in such works, with power to them, in case of variance, to choose an oversman, whose determination was to be final," the present course and action, adopted by the respondents, were incompetent, and a breach of the contract. To this it was answered, that the contract alluded to was now at an end, and the summons now raised concluded to have it declared null and void. Reply, That the conclusion was inconsistent with the first part of the summons, which sets forth, to have it declared, that the appellant had failed to execute his contract, and for £10,000 damages, as a consequence of such failure.

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The Lord Ordinary reported the question to the whole Court, who, of this date, pronounced this interlocutor. "In Dec. 16, 1769. " respect that the present conjoined processes of declarator "and suspension betwixt the parties does not relate merely "to the method of executing the work, or the sufficiency of "the work executed; but also contains a declaratory con- "clusion for having the contract betwixt the chargers and "suspenders declared to be totally void and null: There- "fore, the Lords repel the dilatory defence now pleaded for "the suspenders, and remit to the Lord Ordinary to pro- "ceed accordingly."

Of this date, the Lord Ordinary pronounced this interlo- Dec. 21, 1769. cutor: "Prohibits and discharges the suspenders (i. e. ap- "pellants) from proceeding in the work of building in ques- "tion; and, before answer, allows the chargers to prove "their libel, and facts set forth in their condescendence."

The appellants reclaimed against the interlocutor of the 16th December, praying in their petition, that the respondents were bound to refer their disputes, in terms of the contract, to arbiters, and to ordain them to make choice of an arbiter on their part. On considering this petition, the Court adhered.

Jan. 18, 1770.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The spirit of litigation manifested by the city authorities in this affair is somewhat extraordinary. Not content with the ruin of the architect, they now wish to involve in that ruin his cautioners. Every offer made by the appellant, occasioned by the failure of

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the vaults of the south abutment has been rejected. He, three weeks after the accident, offered to repair it, at his own expense, conform to the plan laid down by the respondents' own architects ; but this was refused, unless the appellant agreed to build other additional works, not mentioned in the contract, without any further stipulated price for *additional work*. He also desired that this matter in dispute should, in terms of the contract, be submitted to arbitration ; and hence the defence which he has been forced to state in bar of this summons of declarator, which in effect shuts out the action.

*Pleaded for the Respondents.*—The appellants are not now at liberty to resort to a preliminary objection, after having joined issue, by appearing and pleading at three several callings before the Lord Ordinary, on 1st, 5th, and 9th December. But even though this plea could now be competently entered into, in point of fact, it cannot apply to the question at issue. The contract only applies to any disputes that might arise in the course of the work, in regard to the *mode of execution* and payment, and not to the case of the *total failure in performance*, or to a *breach of the contract*. The present action is not raised on any dispute arising out of the contract, but for failure to perform it, and for damages as a consequence of that failure. But, *separatim*, an agreement to refer all difficulties to arbiters, does not bar the parties from resorting to courts of justice for relief, in cases which require such interposition : so the Court had decided in the case of the Carron Company *against Dundas of Fingask*.

After hearing counsel, it was

Declared that the plea pleaded on the 14th Dec. last in bar of the action, is irrelevant and inadmissible, *although there had been no conclusion for having the contract adjudged, to be totally null and void* : And it is ordered and adjudged that the appeal be dismissed ; and that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Al. Wedderburn, Thos. Lockhart.*

For Respondents, *Ja. Montgomery, Al. Forrester.*

*Note.—Unreported in Court of Session Reports.*

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JAMES FAIRIE,	-	-	-	<i>Appellant.</i>	FAIRIE
JAMES WATSON,	-	-	-	<i>Respondent.</i>	v. WATSON.

House of Lords, 19th February 1770.

**CONQUEST—APPROBATE AND REPROBATE.**—In a marriage contract, the husband had conveyed the whole lands and heritages that he might conquest or acquire during the marriage, one half to themselves in conjunct fee and liferent, and to the children of the marriage in fee; *whom failing*, to his wife's own nearest heirs. And in case of his dying without children, and his wife surviving him, then in that case disposing to her 100 merks, in full of all she, or her next of kin could claim: Held, in an action by her next of kin, for one half of the conquest after her death, that she could not approve and reprobate the same deed by accepting the 100 merks, and also claiming the conquest; and that the house purchased during the marriage was not conquest, it appearing to have been purchased with funds at his disposal at the commencement of the marriage, and not with funds acquired by him subsequent thereto, and during the subsistence thereof.

James Stewart, by his first wife, had a daughter, Elizabeth, who married James Watson, father of the respondent.

On his second marriage with Janet Auld, he entered into a contract of marriage, by which she, on her part, conveyed her tocher, and he on his part disposed to himself and the said Janet Auld, and the longest liver of them, in conjunct fee and liferent, and to the heirs of the marriage in fee, whom failing, to his own nearest heirs and assigns whomsoever, his tenement, yard, and land in Rothsay; and further provided all lands, heritages, tenements, annual-rents, tacks, steadings, rooms, possessions, corns, cattle, insight plenishing, bills, bonds, &c. that he *should conquest, acquire or succeed to during the marriage*,—one half thereof to himself and wife in conjunct fee and liferent, and to the bairns to be lawfully procreated between them in fee; whom failing, to the said Janet Auld, her own nearest heirs, executors, legators, or assigns whatsoever; and the other just and equal half thereof, to and in favour of himself, and the bairn or bairns to be lawfully procreated, whom failing, to his own nearest heirs, executors, or assigns whomsoever. There was a restrictive clause, providing that if he should die without children of the marriage, then his said wife should be bound to accept of 100 merks, which he thereby dis-

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pones to her, in full satisfaction of all she or her next of kin could ask or claim.

During the subsistence of the marriage he disposed of the heritable subjects in Rothsay, and purchased others in Glasgow. He took the disposition to himself, his heirs and assigns whomsoever, and passed infestment in like terms, giving in the same instrument a liferent to his wife. These premises were afterwards dispossed by him to his daughter by his first marriage in liferent, after his own and the liferent of his wife Janet Auld, and to the heirs-male procreated of the marriage between the said Elizabeth Stewart and James Watson.

He died in 1729, leaving his wife to survive him, but no issue. His wife died in 1733. Her representative was the appellant Fairie; and having served himself heir in general to her, he raised the present action against Watson, for one half of the conquest. Defence. That there was no conquest. That the house purchased by him during the subsistence of the marriage was not conquest, it having been purchased with the sum which his wife brought with her at marriage. But even supposing it was otherwise, there was a restrictive clause in the conveyance, which confined Janet Auld's right, and that of her next of kin, merely to 100 merks, in the event of there being no issue of the marriage, and of her surviving him. After a proof as to the conquest. The proof did not shew that the deceased had gained or acquired any additional means after his marriage. At its date he was a man of considerable means, and it was proved that he got a sum with his wife sufficient to purchase the house, which the appellant contended was conquest. The

**Feb. 26, 1763.** Lords pronounced this interlocutor:—"Having advised the  
 "state of the process, testimonies of the witnesses adduced,  
 "writings produced, with the memorials given in, in conse-  
 "quence of a former interlocutor, and having heard parties'  
 "procurators thereon, they sustain the defences, asoilzie,  
 "and decerns."

**Mar. 10, 1763.** On reclaiming petition their Lordships adhered. Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—That the one-half of the conquest came to him as representative of Janet Auld, in terms of the articles of marriage, and that as the house in question was purchased by him, during the subsistence of the marriage, the presumption in law was, that it was purchased with funds acquired by him during the marriage, and the

*onus probandi* lay with the respondent, to prove that it was not. 1770.

*Pleaded for the Respondent.*—The intention of the parties by the marriage contract, must be taken from the whole tenor of the instrument. The 100 merks were expressly given in full satisfaction of every claim, and having taken this specific gift, they were not also entitled to claim the benefit of the conquest provision. Besides, to maintain a claim for conquest, it must be proved that the deceased, at the time of the dissolution of the marriage by that event, had acquired means over and above that which he possessed at the time of his marriage. The evidence in the cause proves the contrary; and the tenement purchased during the marriage, was purchased entirely with the funds which he had at his own disposal at the commencement thereof, so was not conquest.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

*Note.*—The appellant did not deliver in his case.

For Respondent, *J. Dalrymple, Thos. Lockhart.*

WILLIAM GRAY and WILLIAM STUART, Merchants, Perth, - - - } Appellants;  
ALEXANDER OGILVIE, Merchant, Leith, Respondent.

House of Lords, 2d March, 1770.

*SALE.*—A bargain was entered into for the sale of 100 hogsheads of *Philadelphia* lintseed, of Messrs. Alexander's Importation, for which £4. 4s. per hogshead was agreed to be paid. Instead of this, the seller purchased himself Virginia lintseed of inferior quality, at £3. 10s. per hogshead, and sent it to the buyer as the *Philadelphia* lintseed which he had bargained for. Held, reversing the judgment of the Court of Session, that the buyer was not liable for the price.

William Gray bargained for 100 hogsheads lintseed, of *Philadelphia* quality, with the respondent, a merchant in Leith, who stated in answer, "the *Philadelphia* flax seed is now some time arrived in Clyde, and there is part of that cargo or-

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" dered here overland ; none yet arrived, but will be here in  
 " a few days. You may, if it can be brought forward in  
 " time to ship for you, have the quantity you mention, being  
 " 100 hogsheads at £4. 5s. a hogshead, delivered here, and  
 " payable in six months.—This, you may be satisfied, is as low  
 " as it can be sold, considering the original cost and land car-  
 " riage from Clyde here, and should the 100 hogsheads be  
 " too much for you to venture on, in case of its being by ac-  
 " cident too late of coming to your market, you may, in the  
 " first instance, confine it to a less quantity, but I cannot  
 " propose keeping it for you after other purchasers offer."

The appellants answered :—“ We are favoured with yours  
 “ of the 19th, and notice that your lintseed is arrived in  
 “ Clyde. We will take fifty hogsheads, although the price  
 “ is very high, £4. 5s., payable six months after delivery, be-  
 “ sides the freight. We think you should deliver it here as  
 “ you did last year. And this we hope you will do, consid-  
 “ ering the risk we run of the markets. We have sent the  
 “ bearer, William Gray’s son, to be satisfied on the above  
 “ particulars.”

Instead of the *Philadelphia* lintseed, he sent *Virginia* lintseed, which was of inferior quality, and which had arrived the same day in Leith as the above letter, consigned to one Mason, merchant, Leith. Gray’s son was taken to the warehouse to be shewn this lintseed ; on looking at it he remarked that it was “ dirty ;” but as he was only authorized to settle the price and carriage, he had nothing further to say. Ogilvie never said any thing to make the son understand that this was not the lintseed his father had bargained for. The sum of £4. 4s. per hogshead was agreed on as the price. Thereupon Ogilvie bought from Mason 62 hogsheads at £3. 10s. per hogshead, and sent it to Gray and Stuart that night for £4. 4s. In the bill of parcels, the seed was described as American flax seed at four guineas.

On the faith of this bargain, the appellants had sold several hogsheads of *Philadelphia* lintseed. But on arrival of it in Perth, and about two or three days afterwards, it was discovered to be bad, whereupon they wrote the respondent stating that it was unsaleable,—that it was old lintseed, abounded with mites, and by quantities run together in it, not at the sides of the casks, but rather in the heart of the casks, it was shewn plainly, that it had been dried and turned over from damaged casks into these ;—and asking “ orders what to do with it.” The respondent came to Perth, and inspect-

ed the seed; but refused any satisfaction, or to take back the lintseed.

The lintseed was thereafter seized, under the act 13 Geo. I., against the importation of mixed or damaged seed.

Thereafter Ogilvie raised action for the price, to which the defence stated by the appellant was, that the seed was unsaleable, and unfit for the purpose for which it was bought. That he had all along bargained for Philadelphia lintseed, shipped by Messrs. Alexander, and not for Virginia seed, as that sent turned out to be.—That even the lintseed sent was so bad as to come under the operation of the act 13 Geo. I., and was seized accordingly. Answered:—That the appellant's son had purchased the seed in question, after having carefully examined it, and being satisfied of its goodness. That the bill of parcels or invoice sent, bore *American* seed; and the last paragraph of his letter, which accompanied these invoices, plainly inferred that it was not the growth of Philadelphia. This letter said, “62 hogsheads of lint-“seed,—you will, I am hopeful, bring it to a good market, “as there is no appearance of your being rivalled from this “quarter. There is now some hogsheads Philadelphia seed “come in here overland, but they are sold at £4. 5s., ready “money.”

After various steps of procedure, the Court of Session, on advising the case on informations, pronounced this interlocutor:—“Repel the defences proposed for Gray and Stewart, and therefore find them conjunctly and severally liable to Alexander Ogilvie, in the price of the lintseed sold by him to them, amounting to the sum of £260. 8s. Sterling libelled, with the interest thereof, from and since 26th October, 1765, until payment, and decern.”

On reclaiming petition the Court adhered.

Mar. 7, 1769.

*Pleaded for the Appellants.*—The appellants have been grossly defrauded by the respondent, in the present case, they treated with him for, and he agreed to sell them, Philadelphia seed of Messrs. Alexander's importation, and the whole correspondence that passed proves this. Instead of sending Philadelphia he sent Virginia seed, by a scheme which enabled him to pocket the difference between £4. 4s. and £3. 10s. on each hogshead sold, effecting thus a profit of 14s. per hogshead. Besides, the Virginia seed sent was bad and unsaleable, it was so bad, as finally to be condemned under the 13 Geo. I.

*Pleaded for the Respondent.*—The transaction on the re-

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spondent's part was fair, open, and candid. Had he meant to pass the seed bought of Mason, for seed imported from Philadelphia by Messrs. Alexander, the seed would have been moved to Messrs. Alexander's warehouse, and there sold. The fairness of his dealing is further made manifest, by his letter to the appellants sending the seed, and acquainting them that young Gray had likely reported their agreement; and concluding there is now some hogsheads of Philadelphia seed come in here overland. In his answer, complaining of the seed, when its defects disclosed themselves, he does not object to the bargain, on the ground that one kind of seed had been substituted for another, and that the seed sent was not the seed bargained for. Besides, it was too manifest that the subsequent seizure of the seed arose from the appellants acting in collusion with the officers of the customs.

After hearing counsel, the Lords  
 Ordered and adjudged that the interlocutors complained  
 of in these two appeals be reversed.

For Appellants, *Al. Wedderburn.*

For Respondent, *Ja. Montgomery, J. Dalrymple.*

Not reported in Court of Session.

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The Rev. Mr. WILLIAM HEPBURN,	-	<i>Appellant;</i>
CHARLES, EARL OF PORTMORE,	-	<i>Respondent.</i>

House of Lords, 12th March 1770.

**RIGHT OF PATRONAGE.**—On a vacancy occurring in the parish of Aberlady, the Crown and Lord Portmore respectively claimed the right to present. Lord Portmore founded his claim upon a disposition granted by the titular Bishop of Dunkeld, in 1589. (to whose see Aberlady was attached, as one of his mensal benefices,) which contained conveyance of the right of patronage: Held, that though such alienations were prohibited at that time by the act 1585, and the church benefices annexed to the Crown in 1587, and though no possession followed, by exercising the right to present on this title, yet Lord Portmore had best right to the patronage in question, which could not be lost by *non utendo*; and which had been ratified in Parliament in 1669.

The parish of Aberlady having become vacant, the right of presentation was claimed respectively by His Majesty (who presented the appellant), and by the respondent, who claimed the right of patronage, as having been conveyed

to him along with his barony or lands of Aberlady, and declarator was brought by him against the Officers of State, to have his right ascertained. The parish originally belonged to the Bishop of Dunkeld, as part of his see; and the churches called Mensal churches, were a part of the estates of Scots bishoprics. They were so called, from being inseparably annexed to the bishopric, for the support of the bishop, who was perpetual rector, and had the appointment of the vicar, to whom a stipend was allotted out of the living. He could not assign this to any other body or person, spiritual or lay, which was expressly forbid by the canon law; and wherever the great tithes of a parish belonged, before the Reformation, to a bishop, or other ecclesiastical body, the right of presentation adhered thereto, and was not separable therefrom.

The respondent claims his right, through a sale or conveyance made on the part of the titular Bishop of Dunkeld to Patrick Douglas, of the parish of Aberlady, as one of his mensal churches, in 1589, which disposition is signed by his dean and chapter, and contains a conveyance of the right of patronage thereof. The lands were thereafter sold by Patrick Douglas to Sir Robert Douglas, and next to Alexander Hay, who obtained a new charter, without mentioning the patronage of Aberlady; and they were then by him sold to Fletcher, and by Fletcher to the respondent.

The Crown contended, that, by the act of Charles II. 1585, dispositions of the benefice, and leases of the tithes thereof, were strictly prohibited; and two years thereafter, all bishops' estates were, by act of Parliament, annexed to the Crown. The bishops were thereafter restored, in 1606, to "their honours, privileges, livings, and rents, as the same "were in the Reformed Kirk most amply before the Act of "Annexation, 1587, excepting all dispositions of patronages "disposed by the titulars and his Majesty, provided they "be ratified in Parliament." In 1617 another act passed, declaring it not lawful for any prelate to dispone or alienate any of his casualties longer than for his own lifetime. The Crown further stated, that the right of the respondent flowed from the disposition of 1589, which being granted by the titular Bishop of Dunkeld, was inept under the above statutes;—that his predecessors were conscious of this, because no possession had followed upon it. On the contrary, the Bishop of Dunkeld, many years afterwards, and when Episcopacy was restored in 1606, entered into possession of

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the whole rights of the benefice and of the tithes of this parish ; and so satisfied was Patrick Douglas himself of the invalidity of his title, that, in 1611, he obtained a *lease* from the said bishop, and under this lease sold to the different landholders the tithes of their lands.

On the other hand, it was maintained by the respondent, that possession in such troublous times was not much to be regarded ;—that a right of patronage could not be injured or lost *non utendo* ;—that several acts of Parliament, above referred to, were intended to save the church from dilapidations, and couched in spirit and intention to benefit the church and bishops, so as their successors might not, by such alienations, be impoverished. But the Crown cannot derive any benefit from pleading these statutes. They can only be pleaded to the effect of favouring the bishops themselves.

1669. It further appeared, that in 1669 this conveyance of 1589 was ratified in Parliament, whereby his Majesty dispossessed Sir Andrew Fletcher, the respondent's author, the foresaid lands, with the right of patronage, teinds, and others foresaid. Sir Andrew Fletcher continued to possess

1733. under this title till the year 1733, when the lands, with the right of patronage of Aberlady, came into the respondent's possession. And in regard to the point of possession, it was further urged, that between 1589 and 1645, no opportunity ever occurred for the patrons to present. During the period which intervened, the vacancies had been filled up by parochial calls, or settlements without recourse to presentations from the patron. A vacancy occurred in 1684, and on the minutes it appears that John Gray was inducted “ upon presentation.” but of whom is not said, a usual style when the presentation emanated from the bishop. After this, patronages being abolished in 1690, the two vacancies which occurred before the present vacancy, was made by parochial settlements, so that up to the present, no opportunity occurred of exercising possession under the right.

1768. The Lord Ordinary, of this date, “ found that the right of presentation in question was in Lord Portmore, the pursuer, and decerned and declared accordingly.”

On reclaiming petition to the whole Court, they, by an interlocutor, of this date, “ sustained the defences, and discerned, and assailed the officers of state.” The respondent reclaimed, whereupon the Court, of this date, pronounced this interlocutor :—“ Having advised this petition, “ with the answers thereto, find that the right to the patron-

Feb. 8, 1769.

March 9, —

"age of the church of Aberlady is in Lord Portmore, and  
"decern and declare accordingly, superseding extract till  
"the 20th June next."

Against this interlocutor the appellant presented the present appeal.

*Pleaded for the Appellant.*—The respondent himself all but gives up the ancient title of 1589. This title was void from the beginning, and, accordingly, his own authors acted upon this distinct understanding, abandoned it, and it was never completed by possession. A different right, that of a lease, was soon thereafter obtained by the same party who had obtained the disposition of 1589; and it is under this lease that the respondent can alone ascribe his title, right, and possession, for under it alone the teinds or tithes were uplifted and enjoyed by them, while the attendant right of presentation remained with the bishop, or those who had come or been put into his place, so that any claim on these ancient titles is lost by the negative prescription, as well as barred by the positive prescription. Thus prescription will equally operate against the ratification title of 1669, because no possession followed on it on the part of Sir Alexander Fletcher, and although no opportunity may have occurred of presenting, yet the substantial estate, namely, the parsonage and tithes, were never claimed, far less taken possession of by him.

*Pleaded for the Respondent.*—The charter from the Crown of 1589, to Patrick Douglas, proceeded upon a disposition and resignation from the bishop, with consent of his dean and chapter, erecting the lands and patronage, &c. into a barony, completed by infestment—the most formal and perfect feudal right that could be contrived; all persons and powers having concurred therein. The uncertain state of public affairs in those days made it customary to obtain ratifications in Parliament of all grants from the Crown, and accordingly it appears from the ratifications 1669, that the grant had been ratified; and it is there again ratified. The patronage did pass as a part of the barony in the after charters and conveyances; and in that manner was conveyed by Alexander Hay to Sir Alexander Fletcher, who, having resigned the barony in the hands of the Crown, in 1669, obtained a new charter, with a novodamus, granting of new the lands and patronage; and that charter having been ratified in Parliament the same year, the right to the patronage became vested in Sir Alexander Fletcher. The Crown and church

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SIMPSON, &c. being thus divested of all right to the patronage, and it being incorporated with the lands, by the creation into a barony, no possession was necessary for the preservation of their right, it being an established principle in the law of Scotland, that rights of property cannot be lost or injured *non utendo*. But, in point of fact, possession had followed. The grantees of this right of 1669 granted presentations when they happened; as patrons they obtained exemption from ministers' stipend 1673 and 1749. But, above all, possession of the barony lands was possession of the patronage, upon the principle that possession of any part is possession of the whole, in lands so erected.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For Appellant, *Al. Wedderburn, Al. Forrester.*

For Respondent, *J. Dalrymple, J. Lockhart.*

*Note.—Unreported in Court of Session.*

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JOHN WILKIE of Foulden, Esq. - - - *Appellant;*  
 SAMUEL SIMPSON of Nunlands, and the Rev.  
 Mr. JOHN BUCHANAN, Minister of the } *Respondents.*  
 Parish of Foulden, - - -

House of Lords, 14th March, 1770.

GRASS GLEBE.—In the selection of any individual lands, out of which to design a grass glebe to the minister—(1.) Held, that kirk lands, though for sometime turned into culture as arable land, were to be designed in preference to other kirk lands *in pasture* at a greater distance from the manse. Also, (2.) Held, that the minister had a right to insist on such designation, though the proprietor of the arable land had agreed, in a division of a common within the parish, to give the minister the right of pasture, for one horse and two cows, in lieu of grass glebe, and the minister had enjoyed this right on the part of the common allocated to that heritor, for time immemorial.

The question in this case was, Whether a certain part of the appellant's estate was subject to be designed as a grass glebe for the minister, and had been lawfully so designed; and whether other lands ought not to have been taken in their stead?

The solution of this question depended on an accurate view of the law on the subject, and on whether the appellant's lands were to be considered kirk lands, of the nature of unarable lands, or not.

By the law of Scotland, ministers are entitled, in rural parishes, 1st. To a manse; 2d. Four acres for corn glebe; and, 3d. To a grass glebe, sufficient to grass one horse and two cows.

The act 1663, c. 21, which regulates manses and glebes, has the following clause with reference to the grass glebe:—  
 “That every minister (except such ministers of royal burghs, who have not right to glebes,) have grass for one horse and two kine, over and above their glebe, to be designed out of kirk lands; and if there be no kirk lands lying near the minister's manse out of which the grass glebe for one horse and two kine may be designed; or otherwise, if the said kirk lands be arable land, in either of these cases, ordinates the heritors to pay to the minister and his successors yearly the sum of £20 Scots for the said grass for one horse and two kine; the heritors always being relieved according to the law standing of other heritors of kirk lands in said parish.” Also, “That in all designations of glebes, incorporate acres in village or town, where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk.”

Kirk lands are such as were anciently granted to churchmen for their livings, in consideration of spiritual services: and are still known as such, by their being described in the charters or grant, as *terreæ ecclesiasticæ*, and are so distinguished from other lands in the parish, called temporal lands.

By the very nature of grass glebe, and by the express terms of the statute, this behoved to be designed out of kirk lands lying in pasture, not out of arable kirk lands: or, as it was called, infield and outfield. These terms were distinct. The former referring to arable land, and constantly under cultivation; the latter being pasture, and permanently remaining so, for the purpose of feeding cattle.

The appellant, Wilkie, and his ancestors, were proprietors, and infest in the barony of Foulden, lying in the parish of Foulden, but not comprehending any *kirk lands*.

Another heritor in the parish was one Mr. Rule of Nunland, who fifty years stood infest “in totis et integris terris

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" ecclesiasticis, rectoris et vicariis ecclesiae parochialis de  
 " Foulden extend. ad tres husbandias terras jacen in lie  
 " runrig, infra villane de Foulden, cum mercata terræ vocat.  
 " lie park, quæ jacet simul et contigue, ac etiam cum pas-  
 " tura quadraginta duarum soumarum animalium, et pas-  
 " tura septem equorum, dictis terris ecclesiasticis spectan.  
 " annuatim pasturand. super communia et infra bondas an-  
 " tedictæ villæ et territoriæ de Foulden, ac etiam in tota et  
 " integra illa petia terræ vocat Nunland jacen. in villa et  
 " territoria de Foulden."

In 1719 the appellant's father bought of Mr. Rule of Nunlands some small parcels of his lands, called Clartyburn, lying runrig, or intermixt with parts of the lands of Foulden; and, in a charter taken out of those lands in 1721, they are described, " Totas et integras terras et baroniam de Foulden, &c. " Ac etiam totas et integras tales. partes et portiones terrarum " ecclesiasticarum rectoriarum et vicariarum ecclesiae paro- " chialis de Foulden, extend. ad tres husbandias terras ut " infra mentionat. viz. totas et integras tres quarterias terra " in Whitecornlees tam outfield quam infield jacen. lie run- " rig cum dicti Jacobi Wilkie terris de Whitecornlees, et " totum et integrum dimidium terræ de lie infield jacen in " occidentali parte de Foulden et dimidium terræ lie infield " vocat Clartyburn."

The respondent, Simpson, purchased the estate of Nunlands from Rule; and the other respondent, Rev. Mr. Buchanan, having possessed nothing as a grass glebe, but a precarious right of pasture on a common, applied to the presbytery of the bounds, to be designed a grass glebe, in terms of law. His petition was accordingly intimated to the heritors, who appointed inquiry to be made of the kirk lands in the parish. The minister himself fixed upon Clartyburn, which he represented to be kirklands, being those purchased by the appellant's father from Rule. The appellant admitted the purchase of parts of the estate of Nunlands, called Clartyburn, but objected, that as these were now in the natural course of agriculture, ploughed down and blended with parts of his lands of Foulden, that arable kirk lands could not be so designed. That the act of Parliament gave no power to design any but un-arable kirk lands; and that he had made offer to pay his share of the £20 Scots, to be paid to the minister in lieu of grass glebe. The presbytery, regarding these objections as well founded in law, were of opinion that they could not

attach the appellant's lands of Clartyburn for the minister's grass glebe, in respect these were infield land; and being satisfied that the nearest unarable kirk lands in the parish were in possession of the respondent, they pronounced decree, designing a grass glebe out of the estate of Nunlands accordingly. A charge of horning being sued out on this decree, the respondent presented a bill of suspension, to which afterwards he added a declarator. Simpson contended, that formerly the heritors and the minister of this parish enjoyed their pastures in common, upon outfield lands and moors belonging to the heritors in common. The heritors divided that common among themselves about thirty-five years ago; and, upon a compromise, Mr. Wilkie undertook the burden of the minister's pasturage, and the minister accordingly possessed the pasturage of one horse and two cows, and twenty sheep upon Mr. Wilkie's lands; and the minister being thus already provided of pasture, had no right to demand a designation of grass glebe under the statute. Even supposing the respondent's lands to be kirk lands, they ought not to be designed, since they lay at a greater distance from the minister's manse, and were actually arable lands, consequently, in terms of the statute, the minister could only be entitled to £20 Scots yearly, in lieu of grass glebe. Answered by the minister.—That the minister's present pasture possession was a precarious right, and could not preclude him from his demand under the statute. That although, during the pendency of the present proceedings, part of the respondent's lands in question were ploughed down, yet this was merely to defeat the minister's right. But this could not be, as it was notorious that the whole of the estate of Nunlands was kirk lands, and described as such in the title-deeds. In reply, the respondent maintained that the statutory provision for ministers' glebes was intended for the benefit of those ministers only who were unprovided of a sufficiency of grass for a horse and two cows. That the minister could not say he was unprovided, since his predecessors had immemorially enjoyed a pasturage of one horse and two cows and 20 sheep on the appellant's lands; and if the minister now seek a designation, it must be out of those lands (the appellant's) from which he has so long enjoyed this right. This latter fact was denied to the extent stated.

The Lords pronounced this interlocutor:—“Having ad- Jan. 25, 1769.  
vised informations given in *hinc inde*, the Lords find that  
‘the grass for the minister's pasturage must be designed

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" out of John Wilkie of Foulden's lands, in the parish, and  
 " not out of Samuel Simpson of Nunlands, his lands. Find  
 " the said John Wilkie liable to the said Samuel Simpson in  
 " the expenses of process hitherto incurred, and ordains an  
 " account thereof to be given in to the Lord Ordinary, to  
 " whom they remit the cause, to proceed accordingly."

The Lord Ordinary thereafter remitted " to the sheriff-depute, or his substitute, of the shire of Berwick, to allocate and set apart as much of the lands of Clartyburn, and grounds adjacent, belonging to John Wilkie of Foulden (the appellant), as will be a sufficient grass glebe to the minister of Foulden for a horse and two cows, with power to the sheriff to take a proof by witnesses, of the value of the grounds to be allocated, and to cause make a plan thereof; all to be reported to the Lord Ordinary."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The act warrants only the designing of grass glebes out of kirk lands; and if there be no kirk lands, or if the kirk lands be arable lands, ordains £20 Scots to be paid by the heritors to the minister yearly, in lieu thereof. It being apparent to the presbytery, and to every one, that all the kirk lands that he was possessed of in the parish, were infiel or arable lands, and had been in that state for time immemorial, and so described in his charter of 1721, as "dimidium terræ lie infiel vocat Clartyburn," these lands were not subject to be designed. And the pasture formerly enjoyed by the minister in common with other pasture rights on the common within the parish, could not affect the present question in any manner of way, because the common lands and kirk lands of Clartyburn were distinct.

*Pleaded for the Respondents.*—It is admitted that the minister has had an immemorial right of pasture upon the appellant's lands, on that part of the common allocated to him when the division thereof took place, therefore, if the minister insists for a designation, that designation will fall to be made out of his lands. And it is no answer to this, that the appellant's lands, particularly that part consisting of the kirk lands, have been reduced to culture, and converted into arable land; because the very fact of their being kirk lands informed him of the burden which they were subject to, as from the minister, and therefore he cannot, on this ground, remove that burden from himself and lay it on the respondent.

After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors complained of be affirmed, with  
 £60 costs.

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 &c.

For Appellant, Ja. Montgomery, Al. Wedderburn.  
 For Respondents, Al. Forrester, Thos. Lockhart.

Note.—Unreported.

JAMES SIMSON, - - - - - *Appellant;*  
 ALEXANDER M'MILLAN, and WILLIAM M'DONALD, Writer, his Attorney, - - - - - } *Respondents.*

House of Lords, 16th March, 1770.

SALE—ABSOLUTE RIGHT OR RIGHT IN SECURITY.—Circumstances in which a sale of houses by auction was held to be unwarrantable, rigorous, and unfair, from the conduct of the seller, the conduct of the judge, and from the price at which it was sold. Also circumstances in which certain letters proved that an absolute disposition was a right merely in security.

The appellant, a merchant in Glasgow, was in the habit of making advances to the respondent, Alexander M'Millan, a herring and provision merchant in Campbelton. These advances amounted at one time to £1277. 9s. 2d.; and various and repeated letters having been sent to the respondent for payment, his brother thereupon became bound along with him by the following letter:—" 23 September 1757. " As you have on the 13 instant advanced £1277. 9s. 2d. " Sterling to my brother Alexander M'Millan and me, I " hereby bind and oblige me to pay the same, with interest, " and one half per cent. likewise, for such sums as you shall " advance for our joint account in time coming."

The appellant, notwithstanding this letter of security, did not receive payment of his advances as he wished; and he resorted once more to pressing letters. In some cases, answers came with small remittances, and promises of the balance when his houses in Campbelton and his ship were sold.

Again the appellant wrote, stating, " As you don't find " any person in your country disposed to purchase your " houses, &c. in Campbelton, rather than they should be " sold under the value, I believe I had better take a right " to them. They may probably become more valuable some

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" time hence. You may, therefore, if you think proper,  
 " give directions to Mr. Stewart, to make out the necessary  
 " conveyances, and I shall account to you for the value that  
 " shall be put upon them by indifferent people."

An absolute disposition and conveyance was granted to the appellant accordingly, but without any back bond, and no writing except the above letter, to shew the nature of the right so acquired. A vendition of the ship was granted, and thereafter sold, and the price, £200, put to the respondent's credit; after which, it appeared by a docqueted account signed between the parties, that the balance was thus reduced to £732. 4s. 1d. To this account there was the following docquet: "When I dispose of the houses "in Campbelton, disposed to me by Alexander M'Millan, "the money I receive for them is to be applied to the cre- "dit of his brother's account.—(Signed) James Simpson."

The appellant having failed to obtain payment in any other way, resolved to sell the property in Campbelton, and gave notice of this to Archibald M'Millan, the respondent's brother and surety.

The 15th of July was advertised as the day of sale, which was afterwards adjourned to the 15th August.

The respondent then, for the first time, hearing of the sale of his houses, wrote the appellant, stating his surprise, and adding: "If you must and will have your money, please let me know of it, and I will find some friend to advance the sum you have due, rather than to suffer my interest to sell at an undervalue." "You have these houses as a security for the balance of accounts I owe you; as such, you ought to give timely notice when you must have your money." To which the appellant replied, "the strain in which you write surprises me much. You know I have an absolute right to these houses, which I have kept rather too long in my hands," and the sale must now proceed.

The sale proceeded, and the houses were knocked down to one MacCallum at £529.

Five months after the sale, the appellant offered the respondent, under form of protest, the balance of his debt, and required him instantly to convey his property, or pay its full value, £800.

Upon this being disregarded, the present action was brought before the Court of Session, on the ground of fraud, in as far as the sale had been unfairly hurried over; that it had taken place earlier in the day than the hour advertised,

and was finished before the expiry of the hour appointed on the day of sale. That the purchaser was a brother-in-law to MacKinlay, the judge of the sale; and, in order to serve him, he was allowed to be purchaser at an under value. A proof being allowed on the value of the subjects, and the manner in which the sale was conducted, one part of the witnesses, whose testimony, it was alleged, was subject to remark, stated that the houses were worth £800 or £1000; a different class stated that they were worth £500 or £600. On the hurry of the sale, it was proved that the sale was advertised to take place between twelve and two o'clock,—that the clerk of sale appeared, and read the articles of sale exactly at twelve o'clock,—that no person appeared to object. It was also urged that the sale did not then commence until all who had intended to be there were present; that after the last offer made by MacCallum, there was sand enough in the glass for several more offers, though none were made. And after the sand had run out, Bailie MacKinlay, the judge of the roup, offered to set up the glass again, if any person was disposed to offer more.

But one of the witnesses, MacKinlay, the judge of the roup, was heard, immediately after the sale, to have delivered himself thus to MacCallum: " You may thank Francis " and me for making you a laird in Campbelton; it cost us " no little trouble to bring it about."

Of this date, the Lords of Session pronounced this interlocutor: " Find the defender (appellant) liable to account " to the pursuer for the within mentioned sum of £800 as " at Whitsunday 1765, with annualrent from that term till " payment, and decern." On reclaiming petition the Court adhered; and, of this date, the Court decerned for £700 of expenses.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The grounds of the interlocutor of the 24th Jan. 1769, at pronouncing of which the Court were divided in opinion, are, that the sale made of the respondent's estate was fraudulent and unfair; that the price it was sold for, was under value; and the sale itself a rigorous and unwarrantable proceeding in the circumstances. The appellant submits there was no evidence of fraudulent and unfair dealing, nor any foundation to support that supposition. When the testimony of all the witnesses is weighed with reference to its credibility, the price at which the property was sold at, was fair and reasonable. Nor was the

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sale itself unwarrantable; on the contrary, from the nature of the disposition and other documents, it was clear the respondent had understood for sometime that this was inevitable. The sale was intimated to his brother, his cautioner for the debt; and he was present at the sale, and looked attentively after his brother's interests.

If there was fraud on the part of the judge and the purchaser, this is no proof that the appellant was participant in that fraud, or accessory thereto; and, consequently, no ground for making him answerable therefor. And that the value put upon the property by the respondent himself was entirely imaginary.

*Pleaded for the Respondents.*—Though the appellant, in his letter of 3d August 1764, maintained that "he had an "absolute right to the property," yet it was clear from his own admissions now, that "it was only a right in security." This right only gave him liberty to retain possession. There was no power of sale, no notice, no premonition or intimation whatever, and no consent from him. On the contrary, the moment he heard of it he disapproved, accompanied with proffers of immediate payment. Without charging fraud, therefore, against any particular person in the progress of the sale, it is sufficient to state, that the appellant has sold these subjects without the respondent's consent, and without any legal intimation given him. So that the act of sale itself, not the mode of conducting it, was sufficient wrong to entitle the respondent to make him responsible for its full value.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Appellant, *J. Montgomery, J. Madocks, John Dalrymple.*

For Respondents, *Al. Wedderburn, H. Dalrymple.*

*Note.—Unreported in Court of Session Reports.*

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HENRY WEDDERBURN, Esq., Second Son of } Appellant; WEDDERBURN,  
 CHARLES WEDDERBURN of Gosford, } &c.  
 SIR PETER HALKET of Pitfirran, Bart., ALEX- } v.  
 ANDER HART, his Curator *ad litem*, and } Respondents. HALKET, &c.  
 JOHN WEDDERBURN of Gosford,

House of Lords, 19th March, 1770.

**ENTAIL—POWER TO ALTER ORDER OF SUCCESSION.**—Entail taken to the makers and longest liver in liferent, and to their eldest son in fee, whom failing, his second son, &c., with a prohibition against altering the order of succession; but no restraint against selling or charging the estate with debt. The eldest son, who succeeded after the maker, finding his own eldest son an idiot, altered the order of succession, and gave the estate to his second son, and the heirs precisely marked out by the original entail. Held, that as he was fear of the estate, he could exercise this power, more especially seeing that the deed so executed had not in view fraudulently to alter the order of succession, but merely to provide for a contingency that had not been contemplated by the maker.

Sir Peter Wedderburn of Gosford married Janet Halket, heiress of the estate of Pitfirran, which was more considerable than his own paternal estate; and having agreed to dispose each of their estates to different members of their family, his wife, by deed of this date, conveyed her estate of Sept. 9, 1706. Pitfirran, “to the longest liver of themselves in liferent, and “to Peter Wedderburn, their eldest son, in fee, and the heirs “male of his body, whom failing, to the daughters, or heirs “female of his body, without division; which failing, to “Charles Wedderburn, their second son, and the heirs male “and female of his body; which failing, to James Wedder- “burn, their third son, and the heirs male and female of his “body as aforesaid; which failing, to Janet, Agnes, and “Christian, their three daughters.”

This deed was of the nature of an entail, and strictly prohibited the succeeding heirs from altering the order of succession, otherwise to forfeit their right. There was a provision also, that if the two estates of Pitfirran and Gosford became united, by one heir succeeding to both, then such heir was to make his election of either, allowing the other to go to the next succeeding heir.

In like manner, a deed was executed by his father, Sir Peter Wedderburn, of his estate of Gosford, taken to him-

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self in liferent, and Charles his second son in fee, and the heirs male of his body; whom failing, to the daughters or **WEDDERBURN**, heirs female of his body without division; whom failing, to &c. v. James Wedderburn, his third lawful son, and the heirs male **HALKET**, &c. of his body.

Before Sir Peter's death, he had been a party to his eldest son's contract of marriage with Lady Amelia Stewart, whereby the estate of Pitfirran was disposed to the same series of heirs as contained in the tailzie of 1706, and under all its conditions and provisions.

Of this marriage, there were three sons, Peter, Francis, and James. Peter, the eldest, was insane from infancy, whereupon his father executed a settlement, whereby the estate was left in precisely the same manner as formerly, excepting as to the order of heirs, the present deed passing over his insane eldest son entirely.

The question then came to be, whether, having reference to the original entail of 1706, which strictly prohibited the succeeding heirs from altering the order of succession, this deed of 1751 was effectual?—A reduction being brought to set it aside, the question was, whether that conveyance precluded him from altering the order of succession? The prohibiting clause on the subject stood thus “That it shall not be lawful to the said Peter Wedderburn, or any of the remanent heirs of tailzie and substitution, above written, to do any fact or deed whatsoever, directly or indirectly in any sort, whereby to alter, infringe, or innovate this present tailzie, in the order of succession, and under the conditions and provisions above specified, otherwise, not only such facts and deeds shall be *ipso facto* void and null, without declarator for that effect, but also that the contravener, and the heirs of the contravener's body, shall omit, lose, and tyne the said lands and estate above written.”

It was contended on behalf of the lunatic, that this clause was binding on the whole heirs of entail. That the deed executed in 1751, by which his father disinherited him, the eldest son, was in contravention of the deed 1706; and the above prohibition therein, against altering the order of succession being binding, the deed of 1751 was inept. On the other hand, it was stated in defence, that Peter Wedderburn the father, was fier,—that the estate was conveyed to him in fee; and as fier he could exercise every act of proprietor. He could sell,—charge the estate with debt, and the only particular wherein his full powers of proprietary were re-

strained, was in regard to the order of succession. In regard to these, much must be drawn from the intention of the makers. They evidently did not contemplate the contingency which has happened,—namely, of the eldest son being a lunatic, so as to incapacitate him from bearing the arms, and assuming the name, or of making his election which estate to take, in the event of succeeding to both. All these acts supposed a will and capacity of judging in the several heirs called to the succession. That the object by this mutual deed between spouses, was not so much to secure the estate to a *particular heir*, as to secure it to the family, and general line of representation chalked out.—That the lunatic's father was fiar, only under this single limitation, that he should not fraudulently disappoint the succession, and as the deed 1751 cannot be construed to be so, but a rational deed, made to suit emerging circumstances, it was valid beyond all question.

The Lords, of this date, "sustain the reasons of reduction of the procuratory of resignation and tailzie made by the late Colonel Sir Peter Halket, dated 14th Oct. 1751, with the charter and infestment following thereon, and redue, decern, and declare accordingly."

And, on advising reclaiming petition, "They adhered to their former interlocutor, and refused the desire of the petition."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—By the law of Scotland, every proprietor in tail has power, by the nature of his right, to exercise every act of ownership; and is under no restraint but what arises from the prohibitions contained in the deed of entail. In the present case, the granter had the whole fee in him. He was expressly allowed to charge the estate. He might have sold it, or forfeited it; and, in short, was under no restraint but that of altering the order of succession, of design and intention to frustrate the said order of succession set forth therein. It is clear that what has given rise to this deed of 1751, was the eldest son's incapacity to take. His insanity was not a foreseen event by the makers of the deed of 1706, and consequently do not provide against it.—The present deed only does what they would have done, in the circumstances, in order to secure what was evidently their intention by the deed; namely, the estate to go to the line of succession chalked out by them. The deed 1751, therefore, cannot in any view be deemed beyond the luna-

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tic's father's powers, or in fraud, or in contravention of the deed of 1706.

*Pleaded by the Respondents.*—The deed of entail 1706, under which the appellant, Sir Peter's father, made up his titles, and possessed the estate, disabled him from altering the order of succession thereby settled, and declared any such act was null and void: he was farther bound by his own contract of marriage 1738 to preserve that order, and as the deed of 1751 alters the order chalked out by the deeds of 1706 and 1738 the same is inept, in consequence of the granter being disabled from granting any deed of that nature.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be reversed, and that the defender be assailed.

For Appellants, *Ja. Montgomery.*

For Respondents, *Al. Forrester.*

*Note.*—Not reported in Court of Session Reports.

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EARL OF LAUDERDALE,	-	-	<i>Appellant;</i>
GEORGE MACKAY of Skibo,	-	-	<i>Respondent.</i>

House of Lords, 21st March 1770.

**CASUS AMISSIONIS—EXTRACT.**—Where a bond was challenged as false and forged, and on production being called for in the improbation, and an extract produced to satisfy production: On its being urged that the original bond ought to be produced, it was stated that it was lost in the hands of the Keeper of the Records; a proving of the tenor being made necessary: Held, that a special *casus amissionis* was unnecessary where, in these circumstances, the proof that the original existed was established—both by the extract, and by the decreets in other processes, and where the Keeper of the Record deponed that such bonds had gone amissing in the Register Office on former occasions.

Action of mails and duties was raised by the respondent, founded on a bond granted by the appellant's ancestor about 70 years before; and a counter action of reduction improbation of the said bond raised by the Earl.

In the course of the inquiry, the bond was called to be produced, but an extract only being produced, which, when compared with the bond, was found to be different in date, and in the witnesses names; the date being 23d instead of 22d February, and Mr. Shaw as witness, in place of Sharp. It was objected that an extract of the bond was not a sufficient satisfaction of the production, more especially in an action of reduction improbation, where the writ in question is impugned, as being false and forged. To this it was answered, that an extract was sufficient where the bond itself was lost; but the respondent fearing the effect of certification for nonproduction of the bond itself, resorted to a proving the tenor; which action being conjoined, the Lords, of this date, allowed a proof of the tenor and *casus amissionis* July 6, 1765. of the bond libelled. When the proof was reported, the whole question resolved itself into the effect of that proof; 1st, Whether, in this suspicious case, there was such proof of the tenor, and of the *casus amissionis* as was sufficient to establish the same, and supply the want of the bond itself? and, 2d, Upon the supposition of the proof being sufficient, whether the tenor ought to be established agreeably to the record, or according to the extract, though it differed from the record?

Upon the first of these points, it was pleaded for the respondent, that Sharp, the respondent's cedent, was factor to the Earl of Lauderdale, and after Kirkwood's death, to whom the late Earl of Lauderdale had granted this bond, Sharp became trustee and executor for Kirkwood. That there was sufficient proof of the tenor from the fact of the bond itself having been the foundation of so many judicial proceedings. 1st, In the confirmation of Kirkwood's testament; 2d, In the commissary decret 1688, and in the other two decrets 1693 and 1694; 3dly, In the various processes at the instance of Kirkwood's executors for exhibition and delivery of said bond, there was no just cause to doubt either the reality of the bond, or the justice of the debt; and in aid of these, there was an unsigned memorial dated 1st March 1688. That the embarrassed state of the affairs of the family of Lauderdale sufficiently accounted for the delay or neglect in attempting to recover the debt; and as the bond appeared to have been delivered over to the Register for custody and preservation, there was sufficient evidence of the tenor, and the law must presume, from such circumstances, that it had been lost by some fatality, or by fault or

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neglect of the keeper of the Record, and that, in these circumstances, no proof of the special *casus amissionis* was necessary : Upon the second point, namely, the apparent discrepancies between the record and the extract, in the date and in the name of one of the witnesses, these were so obviously clerical errors, which had occurred in copying from the original bond, that no effect was due to them.

In answer, it was maintained by the appellant, that as processes for proving the tenor of deeds said to be lost by accident, or destroyed by fatality, is an extraordinary remedy, in which the Court exercise their *nobile officium*, this ought not to be interposed except on weighty occasions, and rarely if ever to be allowed ; whereas, in this instance, there were strong presumptive proofs that the deed had been fraudulently abstracted or put aside, in order to conceal some intrinsic and fatal objections pleadable against it : That in such cases, the policy of the law was, to entertain a just jealousy, seeing that the originals, of which the tenor was wished to be proved, might be purposely concealed, in order to furnish an opportunity of proving them to be different from what they were, or to hide nullities pleadable against them : That in case of bonds inferring a personal obligation only, and liable to be extinguished in a short period, a special *casus amissionis* was by uniform practice essentially requisite to support the proof of the tenor. This more especially in an action of reduction improbation, where the writ is challenged as false, fabricated, and forged, where an extract from the Register could not supply the want of the writ itself, and where, from the whole circumstances, there arose the strongest possible suspicion that the bond had been abstracted and put out of the way : And that the three decrees above founded could not be evidence of the existence of the original writ, while, on the other hand, the neglect to make any claim upon it for so long a time, raises the strongest possible suspicion also.

Dec. 11, 1766. The Lords of Session, of this date, pronounced this interlocutor : " Having advised the state of the process, testimonies of the witnesses adduced, writs produced, with the memorials given *hinc inde*, and heard parties procurators; find the *casus amissionis* of the bond, and tenor thereof as libelled proven, and decern and declare accordingly."

Mar. 11, 1767. On reclaiming petition the Lords, of this date, adhered.

Against these interlocutors the present appeal was brought.

*Pledged for the Appellant.*—From the whole circumstances of the case, there arises the strongest presumption that this bond was, from the beginning, either an absolute forgery, or did labour under such nullities and defects, apparent from the face thereof, as has led to its concealment. That, in these circumstances, no proof of the tenor ought to be held as admissible, without proof also of a special *casus amissionis*, especially with reference to a personal obligation of this nature. *Separatim*, That it was settled law, an extract of the deed, where the deed itself is challenged as false and forged, was not sufficient production. That the interlocutor was therefore erroneous, in so far as it sustained the tenor, agreeably to the extract produced, when it was so clear that the tenor of the extract and the record were essentially different. Moreover, a claim of this sort, brought at a lapse of nearly 100 years, was to be more strictly judged of, where there were so many presumptions of its extinction.

*Pledged for the Respondent.*—The presumptions referred to by the appellant, will have all due weight given them in the discussion on the merits in the action for payment of the bond. Meantime it is premature to allow them to enter into the consideration of this preliminary discussion.

The *casus amissionis* of the bond was fully proved by the keeper of the Records, who speaks to the loss of four other principal deeds in a similar way, namely, by going amissing though copies of them stood entered on the record. A more special *casus amissionis* than this was therefore unnecessary. As, from the nature of the thing, this bond could never return to the parties, because the act of Parliament 1685, c. 38, prohibits all such writs put on record to be returned, so the proof of the tenor of the bond, by the extract, was perfectly satisfactory and complete; and the other objection about the extract copy being different from the record copy was quite immaterial, and apparently a clerical error.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed, with £80 costs.

For Appellant, *David Rae, Tho. Lockhart.*

For Respondent, *Ja. Montgomery, Al. Forrester.*

*Note.*—Unreported in Court of Session Reports.

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**PATTEN, &c.** THOMAS PATTEN, Esq. and the Representa- }  
v. tives of RICHARD RICHARDSON, Esq., } *Appellants.*  
**CARRUTHERS, &c.** Wm. CARRUTHERS, GEORGE CLERK, Wm.)  
DUNBAR, CHARLES WARNER DUNBAR, } *Respondents.*

**House of Lords, 24th March 1770.**

## POWER TO GRANT LEASES OF MINES—IMPLIED RECALL OF FACTORY.

—Two persons acted in this country as trustees for a person abroad, owner of an entailed estate in Scotland. Their previous letters advised them to enter into agreements in regard to the lead mines on the estate, and that any such, entered into by them, would be affirmed and ratified by him. They entered into an agreement with the appellants for a lease of the mines of the estate, binding themselves, so soon as powers to that effect arrived from Antigua, to grant them a regular lease. On this agreement possession followed. These powers arrived ; but, before the regular lease was granted, the owner's affairs became embarrassed, and he sent home to Scotland his son with powers to raise money on his estate, either by lease, assignation, or conveyance of the same, and conferring on him power to grant deeds to that effect. The son granted letter agreeing to give a lease of the same mines to other parties ; Held, reversing the judgment of the Court of Session, that the second factory was not meant as an implied revocation of the first, but was to be viewed only as a power to raise money on the estate, and that the trustees' obligations remained good to grant a lease to the appellants in terms of the *first* agreement with them.

The trustees and attorneys of Patrick Dunbar of Machermore entered into a treaty with Mr. Stevens, agent for the appellants, for a lease of the lead mines on his entailed estate. Mr. Dunbar resided at Antigua, and the trustees acted in Scotland as doers for him. It was not very certain whether lead would be found; but Carruthers and Company had taken a lease of the immediately adjacent lands, belonging to Mr. Heron, and from this Company's operations, strong presumption existed of lead being found. Agnew, one of the trustees, wrote Maxwell, a co-trustee, as follows; "and "in regard we have not as yet proper powers to give them "a tack, they (the appellants) in the meantime would be "satisfied with a letter from us, authorizing them to open "the ground, and promising to give them a tack upon these "terms, as soon as we receive proper powers for that pur- "pose; and if we give such letter, he will order the work "to be begun immediately."

Accordingly the following agreement was signed : " We, 1770.  
 " John Agnew, Esq. of Sheuchan, and David Maxwell, Esq. \_\_\_\_\_  
 " of Cairnsmuir, trustees of William Dunbar, Esq. of Maher- PATTEN, &c.  
 " more, do hereby authorize James Stevens, agent for Tho- v.  
 " mas Patten, Esq. of Bank in Lancashire, and Richard CARRUTHERS,  
 " Richardson, Esq., banker in Chester, immediately to open &c.  
 " the grounds, and make what trials he judges necessary in April 3, 1764.  
 " searching for mines on the estate of Mahermore, and ob-  
 " lige ourselves to give said Messrs. Patten and Richardson  
 " a lease of the mines on said estate, on the same terms as  
 " Patrick Heron, Esq. of Heron, has set those on his estate,  
 " to a mining company he has lately contracted with, as  
 " soon as we have proper powers for that purpose. In case  
 " the said William Dunbar should not authorize us to give  
 " a lease of said mines on the above terms, we are not to be  
 " liable in any damages to said company, or any ways bound  
 " or answerable to them.

(Signed) David Maxwell, John Agnew."

This treaty was duly intimated to Dunbar at Antigua, who wrote: " I have some curiosity to know the terms on which the lead mine is let out, and whether it proves encouraging to the miners, and what value the landlord's share may be." And along with this letter he sends a regular power and factory, authorizing them to grant a lease of the lead mines on the estate.

The above agreement for a lease was immediately followed by possession. This possession was notified to every one, and to the respondents in particular. The respondents had farther notice when one of their number applied to Maxwell for a lease of the same lead mines, he was informed by letter, that the appellants had agreed with them for a lease.

In terms of this agreement Stevens, as acting for Patten and Richardson, put miners on the ground, sunk a shaft, and discovered ore under such favourable circumstances, that the miners, from the certainty of a vein, offered to work it for nothing; but this was delayed until the agreement was confirmed by a regular lease from Dunbar himself.

In November 1764, about seven months after the agreement, Charles Warner Dunbar, son of Patrick Dunbar, returned to Scotland, whereupon he was applied to by the appellants' agent, for a formal lease, in terms of the agreement. This lease was delayed without sufficient explanation.

On the 30th March 1765, the appellants themselves wrote

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PATTEN, &c. the trustees, stating that as they had now been informed by their agent Mr. Stevens, that a regular power and factory had arrived from Mr. Dunbar in Antigua, they now v. CARRUTHERS, called on them to grant a lease in terms of the memorandum &c. of agreement.

The work was resumed for the season in April 1765, by the appellants' miners, who continued to work for four months. In the meantime, Charles Warner Dunbar had granted a letter agreeing to give a lease to the respondents Carruthers and Co., and during these four months operations they got notice to desist, in consequence of the lease so granted. They did not desist, but went on with their operations until the end of the season, when they withdrew. Upon this the respondents' miners took possession of the works and timber with which the shaft was laid down.

It appeared that the father's affairs in Antigua had gone wrong in the meantime, and Charles, the son, was sent to Scotland with a power, dated 1st September 1764, to raise money on Machermore estate, by leases, mortgage, assignment, sale, or other disposition, of all or any part of the same, authorizing him to grant and sign such leases, assignments, and conveyances. And it was in virtue of this power that the son acted in obliging himself to give leases to Carruthers and Co.

Two actions were then brought, one for a lease to Patten and Richardson, in terms of Dunbar's trustees' agreement to that effect; and the other for a lease to Carruthers and Co., in terms of a letter granted by Charles Dunbar Feb. 28, 1765. the son, of this date. These proved their own contents, and proof of possession being allowed to both parties, possession was proved under the first agreement with Patten and Richardson, and a disrupt possession on the part of the respondent. Upon the effect of the proof and the whole case, it was argued for the respondent, that the granters of the first memorandum agreement to Patten and Richardson had no power to grant leases: that they did not accept the subsequent power and factory sent them to grant such, and therefore that the same was put an end to, and superseded by the new power granted to the son: that the appellants were never properly in possession; and that the imperfect possession had thereafter abandoned. By the appellants it was maintained that although the trustees had no power to grant leases, yet from the letters of Dunbar previous thereto, he had given them instructions to that effect,

and assured them, that he would confirm any agreement or promise they should make : That an agreement was effected, and the factory confirming that agreement came subsequently thereto ; that this factory was immediately recorded, which is sufficient acceptance. The letter of attorney, therefore, to Charles Dunbar was not intended, and could not revoke the factory of 30th May, sent to the trustees,—the real object of that letter being to raise money on the estate : That the possession of the appellants took place immediately under the agreement, which continued uninterrupted for two seasons.. But that the possession taken by the respondents was violent, and while they were in the knowledge that another had got the right that they pretended to claim.

The entail having prohibited leases, the son raised against his father a declarator of irritancy of the entail, and obtained judgment thereon, whereupon the respondents alleged that the son, being now owner of the estate, his engagement with them must now take effect. To which it was answered by the appellants, that this proceeding between the father and son could not affect the question. It looked like a collusion, but whether it was so or not, the powers of the parties, at the time of the agreement, must determine the question.

The Lords pronounced this interlocutor :—“ The Lords Feb. 2, 1769.  
 “ having advised the state of the process, writs produced,  
 “ and testimonies of the witnesses adduced, with the me-  
 “ morials given in for the parties, they find that William  
 “ Carruthers and Company have the preferable right to the  
 “ lease of the mines in question, and decern and declare, in  
 “ terms of the libel at their instance, against William Dun-  
 “ bar of Machermore, and Charles Warner Dunbar, his son,  
 “ and asoilzie the defenders, John Agnew, Leonard Ur-  
 “ quhart, and William Maxwell, from the conclusions of the  
 “ libel at the instance of Thomas Patten and Richard Rich-  
 “ ardson, against them, and decern.”

On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The memorandum of agreement entered into by the trustees contains an explicit agreement to give the appellants a lease ; and the reservation at the end of it was simply to indemnify the trustees in case the principal refused to grant it. The principal sent full powers to grant the lease. It was followed by possession, and this possession continued for two seasons. The

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 &c.

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 &c.

only question thus remaining was, Whether on 3d April 1764, Agnew and Maxwell had power to make the lease they contracted for? and whether, subsequently thereto, Dunbar ratified and confirmed this engagement? Whatever doubts the trustees might entertain as to their letters of power in 1761 and 1762, those doubts vanished, and were removed by the power of 30th May 1764, which arrived in August, and was recorded by them in October, a considerable time before Charles Dunbar's arrival in Scotland. The subsequent power to Charles Dunbar, of 1st September, was not meant, and so did not revoke that power; because, by a letter of 21st September from William Dunbar himself, which reached Scotland in December, a month after Charles Dunbar arrived, he reappointed them his attorneys, and restored all former powers. But, besides, there was strong presumptive proof of Dunbar's approving of the agreements. It was fully communicated to him, there was no dissent, and he only writes wishing to know what it was let at. There was also full knowledge of this agreement on the part of the respondents, and the possession had by them after the agreement was in *mala fide*.

*Pleaded for the Respondents.*—The agreement entered into by Messrs. Agnew and Maxwell with the appellants was null and void, being defective in all the necessary forms and solemnities required by the law of Scotland. But, supposing it was unexceptionable in point of form, and otherwise binding, it fell to the ground by the miners abandoning their possession under it. The respondents then entered into possession, in terms of an agreement with Charles Warner Dunbar, who was invested with full powers to enter into the same. They began their works, and have been in constant possession ever since, driving levels, sinking shafts, and taking out ore. It is for the advantage of all, that the mines should be worked, and the metals brought above ground, for the service and use of the community; and possession, to be complete and effectual, must be of this nature, and not that possession had by the appellants, which was imperfect and fruitless. Besides, the appellants' agreement imported no more than a right to make trials, not an obligation to grant a lease, and if they abandon the pursuit, as in this case was done, their agreement will thus be put an end to. It appears that they withdrew their mining implements in May 1764—that they destroyed their works, and carried off their tools in August 1765.

After hearing counsel, it was 1770.  
 Ordered and adjudged that the interlocutors complained  
 of be reversed.

CHATTO, &c.  
 v.  
 BAILLIE.

For Appellants, *Ja. Montgomery, Al. Forrester.*  
 For Respondents, *Al. Wedderburn, Andrew Crosbie.*

Note.—Unreported in Court of Session.

(M. 14,941.)

JOHN CHATTO, Esq., an Infant, and his Admi-	}	<i>Appellants;</i>
nistrator-at-law, - - -		
WILLIAM BAILLIE, Esq., - - -		<i>Respondent.</i>

House of Lords, 26th March 1770.

SUCCESSION—HEIRS.—IMPORT OF TERM “HEIRS,” as used in a destination.

For a full report of this case, *vide* Morison, 14,941.

In a competition of brieves between Agnes Tennent and William Baillie, claiming to succeed to the estate of Stoney-path, under a destination “to A. and his heirs or assignees “in fee; whom failing, to B. and his heirs and assignees,” with which were conjoined mutual declarators, the Court of Session held that B. (the respondent William Baillie), being *nominatim* substituted, on failure of heirs of the body of A., was entitled to be preferred to Agnes Tennent, on the principle that the term “heirs,” as here used, was to be limited to the *heirs* of the *body* of A. Reversed in the House of Lords; it being “declared that John Chatto (son “of Agnes Tennent), is preferable, and entitled to be served “heir of provision to the deceased Mr. William Walker, “under the settlement made by him of his estate of Stoney-“path in 1752; and it is further ordered and adjudged “that the objection to the service of the said John Chatto “be repelled, and that the mutual declarators be conjoined, “and that the said John Chatto be assoilzied from the pro-“cess of declarator at the instance of the said William Bail-“lie, and that the Court of Session do find, in terms of the “declarator at the instance of Agnes Tennent, mother of “the said John Chatto, against the said William Baillie; “and it is further ordered that the said Court of Session do

1770. " give all necessary and proper directions for carrying this judgment into execution."
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- GRAHAME, &c.** For Appellants, *J. Montgomery, John Madocks.*  
**v.**  
**M'NAIR.** For Respondent, *Al. Wedderburn, Thos. Lockhart.*

**JOHN GRAHAME, JAMES COULTER, and Others,**  
**Underwriters of the Ship "The Jean,"** } *Appellants;*  
**and her Cargo,** - - - - }  
**ROBERT M'NAIR,** - - - . - *Respondent.*

House of Lords, 29th March 1770.

**MARINE INSURANCE—DEVIATION.**—Held that deviation of the ship in the course of the voyage insured, must be wilful, in order to void the policy, and that accidental or involuntary deviation will not have that effect. Circumstances in which held wilful deviation not proven.

This was an action brought for a loss on a policy of insurance for £1000, effected on the ship Jean and her cargo, on her voyage from Virginia to Barbadoes. The ship, on proceeding on her voyage, struck on the island of Bermudas, and was lost.

When the insurance was effected in Glasgow the ship was then in Virginia, and the respondent's son was there in charge of her, as master, promising to sail in ten days.

She sailed on the 25th June, but, in consequence of losing an anchor, she put back, and again sailed on the 27th June.

**June 27, 1750.** Of this latter date, the son wrote the respondent, his father, giving him a fresh account of what cargo was on board—the value thereof, and urging additional insurance, stating "be sure you do not neglect to insure the above "value of yours in time; for there is an island called Ber- "mudus, that lies betwixt Virginia and Barbadoes, that I "am very much afraid of; and there is strange notions run "into my head that I will meet with some accident about "it."

This letter was shewn to one Jamieson of Glasgow, in order to effect a further insurance; but, upon reading it, he refused, assigning as his reason, that the goods were over-valued, and he did not like the dreaming part of it, which appeared to him to look like a waking dream.

The respondent then applied to Stalker, an insurance-broker, for an additional insurance, to the extent of £350,

but without shewing him this letter; and the insurance was effected accordingly.

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The ship struck on the Bermudus, and was lost. The appellants stated that this was intentionally done, by agreement between the master of the vessel and M'Nair's son, who was in charge of her, and consequently a deviation wilfully resorted to voided the policy. That Bermudus did not lie in the usual course of the voyage from Virginia to Barbadoes, but is a great many leagues out of the due and usual course of that voyage; and the questions chiefly urged, in reference to the policy for £1000, the additional one for £350 being given up, were—1st. Whether there was any deviation from the due usual course of the voyage insured? and, 2d. Supposing there was, whether such deviation was wilful or accidental?

GRAHAME, &c.  
v.  
M'NAIR.

Proof was led by both parties; and, in addition to this, the appellants maintained that the above quoted letter of M'Nair's son, dated at Virginia, the 27th June 1750, imported at least *an intention to touch at Bermudus*, even before he sailed.

The proof led was conflicting. It was proved by Craig, who was chief mate on the voyage, that two or three days after she sailed on her voyage, M'Nair proposed to him to touch at Bermudus, but he refusing, owing to the danger of the coast, M'Nair told him that if the ship met with accident he should not be loser; and Craig then agreeing, the vessel's course was shaped for Bermudus, which course was continued until the morning of 3d July, when she struck on the Bermudus. Mathie, the second mate, had heard M'Nair say, that he had a good mind to call at Bermudus, as corn was selling there at 9 bits per bushel. That on 2d July, M'Nair, Craig, and Mathie, compared their reckonings. Mathie said to them, that, according to his reckoning, if the ship was steered as they were then steering her, they would see or feel the island of Bermudus before daylight. On the other hand, M'Nair's own journal, or log-book, contradicted this evidence, and shewed that, on the 2d July, the ship was 20 leagues distant from the island of Bermudus, and that the course steered was different from that deponed to by Mathie and Craig. The journal of M'Nair was, however, impeached. He, after the wreck, had got Craig's journal of the voyage to copy, and had mentioned to him that his reckonings made the ship to be too near the Bermudus when she was wrecked, and therefore he should make her farther

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*v.*

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from these islands. The several journals kept were submitted to the inspection of several able navigators, who, after an examination, in presence of M'Nair, Craig, and Mathie, afterwards deponed that these journals nearly corresponded for the whole voyage up to 2d July, when they widely differed as to the course the ship was steering. That if the courses had been followed according to M'Nair's journal, it was impossible for the ship to come nigh Bermudus, whereas, according to Craig's journal, there appeared a design to get sight of that island. That ships in their direct courses from Virginia to Barbadoes always keep at a great distance from the dangerous island of Bermudus, and seldom come nearer it than 20, 40, or 50 leagues to the northward, *except when wind and weather oblige them*. From these materials they made a chart, which showed that on 2d July Craig's journal made the ship steering in a direct course to the Bermudus, but that, according to M'Nair's journal, she was then about 20 leagues from that island, and steering a different course.

The respondent next got up a chart—the object of which was to shew, that the influence of the current or gulph of Florida, frequently operates to throw vessels off their direct course in steering for Barbadoes. But evidence was adduced to shew that the force of this current was not felt so far as Bermudus. It was also proved by the respondent, that when the ship sailed from Virginia, she immediately encountered very bad weather and hard gales of wind. The wind during the first three days was at west and north-west; sometimes varying in squalls of rain and thunder to the extent of six points to west south-west. The course of the ship during these three days was east and east south-east, sometimes running before the wind, carrying no other sail than fore-sail, and sometimes in hard squalls under bare poles. On the fifth day the weather was so cloudy as to disable them from making any observation on which they could rely. That on the eighth day the weather was more moderate, and a good observation had, and the ship's course steering from the south-east. About six o'clock of the evening they foresaw a squall of wind coming on, while the ship was sailing along as close to the wind as possible. That they had compared the reckonings already alluded to, and found them to differ—Mathie stating to M'Nair that if the ship was steered in her present course, they would see or feel the island of Bermudus before daylight. But the wit-

nesses also depone "that there was no foul play," that M'Nair was in great concern for the loss of the ship,—that the ship was not industriously cast away, but was cast away by accident—that there were three or four sloops wrecked on the same side of the island at the same time.

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The Lords of Council and Session, by a majority of six to Feb. 8, 1765. five, found "it not proven that there was any wilful deviation in the voyage from Virginia to Barbadoes; find the policy of insurance does not, in this case, oblige the insurers to pay the sums at which the ship and cargo were insured, but only the real value of the ship and cargo; and find the value of the ship insured to be £456 Virginia currency, being the original price paid by James M'Nair for her; find that James M'Nair's invoice is no evidence of the value of the cargo, and remit to the Lord Ordinary to proceed accordingly."

On reclaiming petition for the appellants, the Court al-June 21, — tered, and held that *no action* lay on the policy in respect of the *deviation* in the course of the voyage; but the respondent reclaiming against this interlocutor, the Lords, Aug. 7, — by a majority of seven to six, *returned to their first interlocutor*, finding "it not proven that there was any wilful de- " viation."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—That there was clear deviation, considerably out of the usual course, in proceeding to Barbadoes, and this under circumstances which import a clear intention on the part of James M'Nair to do so; and deviation being made out, and no evidence adduced to shew that this was by the irresistible force of accident, storm, or through some other involuntary cause, the presumption was that it was wilful. In all such contracts, it is an implied warranty that the ship be steered in the usual due course, and if she is intentionally carried out of that course, the policy is then from that moment discharged, and the underwriters free. In this case there was intentional deviation, and the act of the master must be held as that of the owner, they standing in the relation of father and son.

*Pleaded for the Respondent.*—That no wilful or intentional deviation from the voyage was established by the evidence adduced—that deviation, in order to vacate the policy, must be wilful—that here every circumstance proved the reverse of an intentional deviation, and specially one for the purpose of casting away the ship. M'Nair had put back to

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M'NAIR.

replace a lost anchor. He had sold his large jolly boat, and took only a small boat, which was barely sufficient to hold the crew and save their lives. The witnesses had sworn to M'Nair being concerned for their and the ship's safety, and that there was no foul play. Besides, men of experience had sworn that had it been M'Nair's intention to have gone into the island, no man in his senses would have gone in upon the island in the night time; and in the manner he did, and consequently, that if there was any deviation at all, it was purely accidental and involuntary, arising from the stress of weather. That the ship was in the usual course, 20 leagues from the island, and steering to Barbadoes on the day before the wreck, and that it was about midnight thereof, when a squall came on, that she was lost. Even if there was fraud on the part of the master, which had not been established, that fraud was not traced to the respondent, his father, who was no way accessory or participant therein, and ignorant thereof. Besides, the respondent, by the policy, is expressly secured by the barratry of the master.

After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors therein complained of be af-  
 firmed.

For Appellants, *J. Dunning.*

For Respondent, *John Dalrymple, Ja. Montgomery,  
 Al. Wedderburn, John Swinton, Jun.*

*Note.*—The only point upon which the appeal was brought to the House of Lords, was as to the wilful deviation from the due course of the voyage insured. The other point in the interlocutor of 8th February 1765, Whether the policy obliged the insurers to pay the sums at which the ship and cargo were insured, viz. £1000, or the value of the ship and cargo merely, as the same might be ascertained? formed an after branch of this case, which also went to the House of Lords, and where the judgment of the Court of Session on that point was reversed, 15th Feb. 1773. *Vide infra.*

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ALEX. IRVINE of Drum, Esq., and his Guardians, *Appellants* ;  
 The Right Hon. GEORGE, EARL OF ABERDEEN,  
 Mrs. MARGARET DUFF of Coulter, formerly  
 Widow of Patrick Duff, Esq., now Wife of  
 ALEXANDER UDNY, Esq., and him for his  
 interest, - - - - } *Respondents.*

IRVINE  
v.  
EARL OF  
ABERDEEN,  
&c.

House of Lords, 2d April 1770.

**DECRET OF SALE—EXCLUSIVE TITLE.**—When a decree of sale is impugned, as having been fraudulently obtained, held that production of such decree is not a sufficient title to exclude exhibition of other writs specially called for, as the grounds and warrants on which it proceeded, nor a bar to the action raised for restoration of an entailed estate sold for the entainer's debts; reversing the judgment of the Court of Session.

Action of reduction and decree of sale to have certain entailed estates restored to the appellant, which were sold, under said ranking and decret of sale, on payment of the alleged debts of the entainer, on the ground that the proceedings in the ranking and sale by which he was deprived of the benefit of the estate, were fraudulently carried through, and that no more of the estates than was necessary to pay the entainer's debts, ought to have been sold, yet a sale took place, to the great hurt and prejudice of the appellant, the next heir.

The facts alleged in support of this were, That at the time the ranking and sale was raised, the estate of Drum was not bankrupt, and that, to create an appearance of bankruptcy, fraudulent means were alleged to have been resorted to : 1st. By rearing up fictitious debts; 2d. By overcharging other debts that had been paid in part; 3d. Charging penalties, accumulations, and expenses, not exigible; 4th. By lowering the yearly rent by at least £120 per annum; and, 5th. By concealing the value of part of the estate, upon pretence of its being mortgaged for £833. 6s. 8d., to certain bursars in the College of Aberdeen, though, in fact, the lands were not mortgaged, &c.,—that, though by a ratification executed by the appellant and his brother, of this date, it was understood that no more of the estate was to be sold, but what was equal to the value of the debts then compounded for, which at that time did not amount to more than one-fourth of the value of the estate, yet the whole estate was sold.

The appellant's guardians insisted for exhibition of a bond of provision of £5000 Scots, and adjudications whereby

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&c.

the same was made to affect the estate. *Item*, the adjudications obtained by the Earl of Aberdeen and Patrick Duff; *Item*, The decree of ranking the creditors, and for the sale of the estate and decree of exoneration of the factor, who had received the rents thereof for thirteen years. In bar of the action, and of the exhibition sought, the decree of sale was produced, together with ratification under the hand of the appellant's predecessors, and the purchasers refused to produce any further writ, contending, that these were sufficient, and totally excluded the pursuers. In reply, it was contended, that as the decree of sale was impugned on the ground of fraud, it could not form any bar to the production of the grounds of warrants upon which it proceeded.

The whole Lords, after minutes of debate and information, found "that the defenders are not bound in *hoc statu* "to produce the writs and deeds called for, and remit to "the Lord Ordinary to proceed accordingly."

To this interlocutor, after reclaiming petition, the Court adhered.

It was against these interlocutors that the present appeal was brought.

*Pleaded for the Appellants.*—That here the decree of ranking and sale has been obtained by fraud, and where this is alleged against it, and where the purchasers, as has been condescended on, have been accessory to that fraud, the decree of sale cannot protect them. The estate being settled by strict entail, could not be sold but for payment of the entainer's debts, and no court whatever could authorize a sale of more of the estate than was sufficient for the payment of these debts. Here the whole estate was sold without the consent of the next heirs of entail. Even by the ratification and bond alluded to, it was expressly agreed, That *no more* of the estate should be sold *than was necessary for payment of the debts of the entainer*. But, in place of this, the whole was sold; and he was, therefore, entitled to be restored against that sale, on payment of the entainer's debts. When called in question, they must exhibit the whole writs particularly enumerated in the condescendence; and are not entitled to found on the decree of sale as excluding this exhibition, and thus cover their fraud by the very deed which is challenged as fraudulent. The allegations of fraud, if relevant in themselves, must be taken as true until disproved; and, as the averment is that the decet is fraudulent and voidable, it can afford no protection against the exhibition called for.

*Pledged by the Respondents.*—The appellant is barred by personal exception from maintaining this suit, as well from his actually holding part of the lands of Drum by conveyance from the respondents, whose title, therefore, he cannot challenge, as well by his actual enjoying likewise a sum of money under the agreement, whereon his title is founded. Nor can this objection be removed but by giving up those lands, refunding all the rents, and repaying the 20,000 merks, with interest. Besides, the warranty in the disposition under which the appellant holds, renders the legal bar more conclusive. So does his special service to John Irvine, and to his grandfather and father, who were all barred from challenging the respondents' title by acts of agreement. By his positive ratification also, in 1733, of the disposition in favour of the purchaser, and his discharge of all claims. But more particularly, the decree of sale itself is a sufficient bar to this demand; and is a complete title to the respondents, necessarily precluding any further right of production, as long as the decree remains unreduced, the act 1695 making the title under a judicial sale the most perfect and absolute that can be had.

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HASTIE, &c.  
v.  
ARTHUR.

After hearing counsel, it was

Ordered and declared that the matter pleaded by the respondents is not a bar to this action, or to the appellants' insisting therein, saving the benefit thereof to the hearing of the cause; and it is therefore ordered and adjudged that the interlocutors appealed from, so far as they are complained of by the appellants, be reversed. And it is further ordered that the respondents do produce the writs specially called for."

For Appellants, *Al. Wedderburn, Dav. Rae.*

For Respondents, *Ja. Montgomery, Al. Forrester, Tho. Lockhart.*

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(M. 14,209 et F. C.)

Messrs. HASTIE & JAMIESON, Merchants in  
Glasgow, - - - - - } Appellants;  
ROBERT ARTHUR, Merchant in Irvine, - - Respondent.

House of Lords, 10th April 1770.

**SALE—BILL OF LADING.**—Its effect in transferring the property of the goods.

For a full report of this case, *vide M. 14,209*, along with the subsequent part of it, after its return from the House of Lords.

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**MACKINNON,**  
&c.**v.**  
**MACDONALD,**  
&c.

The circumstances were shortly these :—A consignment of tobacco and goods was made by Archibald Dunlop, a merchant in Virginia, to the appellants, Hastie and Jamieson, merchants in Glasgow, with whom there was a contract to furnish and ship Glasgow goods to Virginia to Dunlop, the latter binding himself to ship tobacco, and make remittances in return.

In August 1765, Dunlop shipped a cargo of tobacco, &c. The bill of lading bore that they were shipped on account and risk of the Virginia merchant, but “to be delivered “unto Messrs. Hastie and Jamieson, merchants in Glasgow, “or *their assigns*; he or they paying freight,” &c.

A few hours after the ship’s arrival in Port-Glasgow, the respondent, a creditor of Dunlop, arrested the ship and cargo for a debt due by him to the arrester.

**Feb. 17, 2d &** The Court of Session held that Archibald Dunlop was not **19th July,** divested of the ship and cargo, and therefore that the **Nov. 29, 1768.** restment attached. And, on appeal to the House of Lords, **Aug. 4, 1769.** **Mar. 2, 1770.** it was

Ordered and adjudged that the interlocutors of the 17th February, 19th July, and 29th November 1768, and 2d March 1770, so far as they relate to the cargo, be reversed: And it is hereby declared that the appellants have a special property therein, preferable to the respondent’s arrestment: And it is further ordered and adjudged that the said interlocutors, so far as they relate to the ship, and all the other interlocutors complained of, be affirmed.

For Appellants, *J. Dunning, Tho. Lockhart.*

For Respondent, *Ja. Montgomery, Dav. Rae.*

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(M. 5279; Brown’s Sup. 848, et 904.)

**CHARLES M’KINNON, Esq. and his Guardians, Appellants;**  
**Sir ALEXANDER MACDONALD, Bart., JOHN MAC-**  
**KENZIE, his Trustee, and Lieutenant JOHN } Respondents.**  
**MACKINNON, - - - }**

House of Lords, 25th February 1771.

**Succession—Substitute—Rights of Do.**—A Sale by an heir-substitute coming into possession as nearest heir at the time of the succession opening, cannot be set aside by a nearer heir born sometime afterwards, of a second marriage.

For full report of this case, see Morison, p. 5279.

The question arose in the following circumstances:—An estate was conveyed to the *eldest son* of John Mackinnon,

an attainted party, whom failing, "to any other son or sons  
 "of the body of the said John Mackinnon, the father, (at-  
 "tainted person,) according to their seniorities; *whom fail-*  
*"ing, to John Mackinnon of Missinish."* The eldest son 1771.  
 died without issue, and the attainted person, although then  
 alive, having then no other sons in existence to take the estate  
 in virtue of the above destination, Mackinnon of Missinish,  
 as specially substituted therein, served heir, was infest, and  
 took possession. Some time thereafter, the attainted father  
 married a young lady, and had two sons by the marriage,  
 who were nearer heirs; but, in the interval, Mackinnon of  
 Missinish had sold the estate. The question of law, in these  
 circumstances, for the decision of the Court was, Whether  
 an heir-substitute in possession of, and infest in, the estate,  
 but whose title was defeasible or determinable by the birth  
 of a nearer heir, could sell the estate, and so disappoint his  
 succession? Held, by the whole Court of Session, that as  
 he was the nearest heir in existence at the time of the suc-  
 cection opening, he was entitled to be served heir of provi-  
 sion, and to take possession of the estate, and this absolute-  
 ly, without any restraint against selling, unless such restraint  
 were imposed by the deed; and sustained the defences  
 against reducing the sale.

Against this judgment appeal was taken to the House of  
 Lords.

After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors therein complained of be, and the  
 same are hereby affirmed.

For Appellants, *Ja. Montgomery, Al. Forrester.*

For Respondents, *Al. Wedderburn, Tho. Lockhart, Ar.  
 Macdonald.*

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(M. 4542.)

ARCHIBALD SINCLAIR, Esq. and WILLIAM SU- }  
 THERLAND, his Attorney, - } *Appellants;*  
 ALEXANDER FRASER, Esq. and JANE, his Wife, *Respondents.*

House of Lords, 4th March 1771.

FOREIGN DECREE.—Effect of a Foreign decree, when founded on in  
 the Courts of Scotland.

For Report of this Case, *Vide Morison, 4542.*

The appellant Sinclair having, as attorney in Jamaica,

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made large advances for his constituent, in Scotland, on being superseded in his office, raised action before the supreme court of Jamaica, and, after appearance made, obtained decree against him.

In an action brought against him in the courts of Scotland, founded upon the decree, the Court of Session held that the foreign decree was not conclusive evidence of the debt, and ordered him to produce the vouchers of his claim.

Against this judgment the present appeal was brought. After hearing counsel, it was

Ordered and declared that the judgment of the supreme court of Jamaica ought to be received as evidence *prima facie* of the debt; and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained. It is therefore ordered and adjudged that the said several interlocutors complained of be, and the same are hereby reversed.

For Appellants, *Al. Wedderburn. H. Dalrymple.*

For Respondents, *Ja. Montgomery, John Dalrymple.*

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HUGH Ross, Esq. and Wife,  
DAVID Ross, Esq.,

*Appellants;*  
*Respondent.*

House of Lords, 10th April 1771.

CLAUSE—Whether a certain clause in a deed carried heritable debts.

*Vide Morison, 5019, for a full report of this case.*

In a conveyance of an estate, particularly described in the deed, there was adjected the following clause: "All my goods, gear, debts, sums of money, corn, cattle, and all other effects, which shall belong to him at the time of his decease, of what nature or kind soever they are." It was held by the Court of Session that this clause did not carry heritable debts secured by adjudication or heritable bonds; and that these fell to the heir at law, although he was expressly cut off from the succession by the deed with a shilling.

On appeal to the House of Lords the judgment was affirmed.

For Appellants, *J. Dunning, Al. Forrester.*

For Respondent, *Ja. Montgomery, Al. Wedderburn.*

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(M. 4409.)

**EDMONSTONE**

v.

**EDMONSTONE,**  
**&c.****ARCHIBALD EDMONSTONE** of Duntreath, - *Appellant;*  
**CAMPBELL EDMONSTONE**, Esq. and Others, *Respondents.*

House of Lords, 15th April 1771.

**ENTAIL—INSTITUTE—FETTERS.**—Held, that where the prohibitory, irritant, and resolutive clauses in a strict entail, are directed against the *heirs of entail merely*, these terms do not include the institute, as he is not an *heir of entail*, but a special *dispossee*; reversing the judgment of the Court of Session.

The appellant and the respondents were sons of the deceased Archibald Edmonstone of Duntreath, by his second marriage with Lady Anne Campbell, sister of the Duke of Argyle. In entering into this marriage, he, by marriage articles, became *bound to settle his lands and estate in Scotland upon himself and the heirs male of his marriage; whom failing, to the heirs male of any subsequent marriage; whom failing, to his heirs and assigns whatsoever.*

Many years thereafter he, by himself, and without concurrence of the appellant, his eldest son, executed a strict entail of these estates, conceived in the following terms: “to and in favour of Archibald Edmonstone, eldest lawful son procreated betwixt me and Mrs Ann Campbell my spouse, and the heirs male of his body, whom failing, to Campbell Edmonstone, my second lawful son, and the heirs male of his body;” and so on, in the same terms of destination, through his whole sons and daughters. He reserved power to himself to alter and change the order of succession, even on deathbed, and also to sell and wadset the same. But prohibited the “*heirs of entail and provision*” from exercising these powers; and the whole prohibitions which were directed against the “*heirs of tailzie only*,” were duly fenced with irritant and resolutive clauses. This deed of entail was recorded in the register of tailzies, but the maker died without any charter being passed, or infestment taken thereon. The question which arose was, Whether, under the prohibitions against the “*heirs of tailzie*,” the appellant, the maker’s eldest son, was comprehended? and whether he was to take a fettered or a fee simple estate?

The appellant contended, upon the supposition that his father had power to make this entail, that as by that deed,

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**EDMONSTONE** *v.* **EDMONSTONE,** &c. he was the donee or fief, the limitations therein, directed only against the heirs of tailzie in general, without mentioning him expressly, either by name or by distinct character of fief, were not meant, and could not be construed to apply to him, and therefore that he was free from the fetters.

In answer, it was maintained, 1st. That the prohibitions applied expressly to the appellant; and, 2dly. That the intention of the grantor was clear that they should apply, because it was expressly mentioned that "the said Archibald Edmonstone, or the first heir who shall succeed to me in the foresaid tailzied estate shall be bound and obliged to cause registrate the said tailzie in the register of tailzies."

June 29, 1769. The Court, of this date, and on report of Lord Monbodo, and having advised the memorials, *hinc inde*, sustained the defences, assailed and decreed. And on reclaiming peti-

Nov. 24, 1769. tion, the Court further "Find that in respect it appears from several clauses in the entail executed by the petitioner's father, that the petitioner Archibald Edmonstone, is comprehended under the description and designation of heir of entail, he is thereby subjected to the limitations and restrictions of the said entail; and therefore the Lords adhere to their former interlocutor reclaimed against, and refuse the desire of the petition."

Against these interlocutors, (in pronouncing which the judges were almost equally divided) the present appeal was brought.

*Pleaded for the Appellant.*—The interest which the appellant has, is an estate in fee, qualified indeed by after conditions; but, in the first instance, the whole fee is vested in him. That entire fee, therefore, with all the full exercise of ownership, must belong to him, except in so far as the deed makes it expressly appear that all, or some, of its limitations apply to him. When these conditions are set up to establish a perpetuity, and for ever to restrain the free use of property, law does not sustain prohibitive, irritant, and resolutive clauses by mere implication, or by evidence of the intention of the maker. Nor when these clauses are aptly used, will they be held to apply to more than those against whom they are expressly directed. And in no case can they be held to apply to the institute or donee under the general terms "heirs of tailzie and provision," because such a person is not an heir of tailzie, but one who takes as donee. Where, therefore, the fetters are not expressly directed against him by name as institute, or by such terms

as clearly show that he was included under them, he will be entitled to take the estate as absolute fiar. Such was the law laid down in *Leslie v. Leslie*, and the case of *Balfour*; and the Court ought not to depart from the law laid down by these cases. Besides, the marriage articles which bound the father to settle the estate on the heir male of the marriage, joined to leaving the appellant out of the prohibitive, irritant, and resolutive clauses, support this construction of the deed.

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*Pleaded for the Respondent.*—The powers of Archibald the father to execute the entail cannot be disputed. The question here, is not with creditors or purchasers, but between the heirs *inter se*, in which the will of the maker must form alone the only rule. From that deed the entainer's intention is clear to bind all the persons called to the succession by the entail, and it is equally certain that the terms used are apt and sufficient to make good that intention. After disposing the estate to the appellant and his other brothers and sisters, it is declared to be “always with and under the burden of the provisions, conditions, &c. after expressed.” The obligation to infect the appellant is *under the conditions before mentioned*, and the term “other,” in this and other parts of the deed, plainly shows that the entainer considered the appellant as an heir of tailzie, and therefore that the whole conditions apply to him.

After hearing counsel,

Lord Mansfield moved the reversal of the judgment of the Court below, assigning his reasons expressly in the judgment, as follows:—

Ordered and adjudged that the interlocutors complained of in the said appeal be hereby reversed; and it is hereby declared that the appellant being fiar, or dispossess, and not an heir of tailzie, ought not by implication from other parts of the deed of entail, to be construed within the prohibitions, irritant and resolutive clauses, laid only upon the heir of tailzie.

For Appellant, *Ja. Montgomery*.

For Respondents, *Tho. Lockhart*.

**NOTE.**—This is the leading case on this point, in conformity with which all the subsequent cases have been decided. *Gordon v. Hay*, 8 July 1777; M. 15462. *Menzies v. Menzies*, 25 June 1785; M. 15436. *Wellwood v. Wellwood*, 31 May 1791; M. 15463, &c.

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(M. 10805.)

BRUCE  
v.  
BRUCE.

JAMES BRUCE of Carstairs, - - - *Appellant* ;  
MISS ANNA BRUCE, - - - *Respondent*.

House of Lords, 7th April 1772.

POSITIVE PRESCRIPTION.—Title of possession.—Objections to testing of deed.—Circumstances which elided such objection.

*Vide* Morison, p. 10805, for a full report of this case.

Infeftment in the superiority of lands had been taken, with possession thereon for forty years of the lands themselves, the property of which was also in the same person; but on a different title, viz. a title of appurtenance, the Court of Session held that this title was sufficient to acquire the fee of the lands by the positive prescription. There was a separate objection stated to the marginal notes of one of the deeds composing this title, as not being duly tested in terms Feb. 21, 1769. of the act 1681. The Lord Ordinary pronounced this interlocutor: "Finds that the pursuer has right to the Inch of St. Nov. 29, 1769. " Silvanus upon the positive prescription, and decern and de- Dec. 6, 1770. And on reclaiming petition the Court pronounced this interlocutor: "That the defender has condescended on acts of homologation sufficient to remove the objection, that the marginal notes in the marriage contract 1687 were not tested in terms of the act 1681; but in respect of the infeftment in the person of Sir Thomas Bruce, on the precept of *clare* 1721, and of the infeftment in the person of Sir John (the respondent's father) on the precept of *clare* 1740; and of their possession of the island of St. Silvanus upon said infeftments for more than forty years, find that the pursuer, as heir to Sir John, has right to the said island in virtue of the positive prescription."

Against these interlocutors the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the 21st February and the 29th November 1769, and also so much of the interlocutor of the 6th December 1770 as is complained of by the original appeal be, and the same are hereby affirmed; and that part of the interlocutor of 6th December 1770 complained of by the

cross appeal be varied as follows: after (that the defendant has) leave out (condescended on acts of homologation) and insert (alleged matter) after (sufficient to) leave out (remove) and insert (answer).

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For Appellant, *Al. Forrester, Dav. Rae.*

For Respondent, *Ja. Montgomery, Al. Wedderburn.*

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JOHN DEAS and Others, Feuars in Prince's Street, within the Extended Royalty of the City of Edinburgh, and Proprietors of Houses there, - - - } *Appellants;*  
 The LORD PROVOST, MAGISTRATES, and COUNCIL of Edinburgh, - - - } *Respondents.*

House of Lords, 10th April 1772.

This was a bill of suspension and interdict applied for by the proprietors and feuars of the houses in Prince's Street, against the Magistrates and Town Council of Edinburgh, to interdict and prohibit the building and erecting houses opposite their feus, in Prince's Street gardens, then called the North Loch, in violation of the Plan and sales of these feus, and of the original proposals and resolutions of the Magistrates, held out, and agreed to, by them, in granting their feu rights. These resolutions were embodied in the acts of Parliament obtained for extending the royalty, which stated and described the objects to be, "to enlarge and beautify "the town, by opening new streets to the north and south, "removing the markets and shambles, and *turning the North* "Loch into a canal, with WALKS AND TERRACES ON EACH "SIDE." And the *plan* drawn out and adopted by the Magistrates and shewn to the feuars showed these grounds (Prince's Street gardens) so laid out for pleasure grounds and walks.

The Magistrates, in advertising the feus, further assured the feuars, that on taking the feus in Prince's Street, they would obtain the same, with perpetual right over the grounds between their feus and the Canal, or North Loch, under the proviso, that no building should be erected there.

On the faith of this *Plan* and these resolutions, the appel-

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In the present interdict, the Magistrates accordingly maintained that their charter or feu-right, not containing any right or privilege of the kind claimed, it was open to them to feu out these grounds for building.

The Lord Ordinary (Monbodo), reported the case to the Court, who remitted to his Lordship, with instructions to Feb. 13, 1772. refuse the bill. The Lord Ordinary, of this date, refused the bill accordingly.

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—The *Plan* of the streets and squares upon the extended royalty of Edinburgh, was the proposition of the Town Council of the city to the public. It supplied the place of a written obligation in point of form, and required only acceptance upon the part of any purchaser to make it binding. The appellants, when they purchased feus agreeably to this *Plan*, purchased an indiscriminate interest and servitude over every other part of the property described upon it, opposite to their feus, down to the North Loch. The Magistrates, therefore, had it not in their power to deviate from that Plan in the smallest degree, by selling building feus on the grounds of the North Loch. This Plan is not to be viewed as a mere voluntary act. It was made and designed in terms of original proposals entered into, many years previously, in regard to the improvement of the city, on the faith of which two acts of Parliament had been obtained, extending the royalty. The appellants did not treat on the footing of the act of council. They never saw it: and, therefore, they were entitled to rely on the plan, and the Magistrates were bound to conform thereto.

*Pleaded for the Respondents.*—The present bill of suspension is brought as incidental to their declaratory action. Whatever the issue of this action may be, the question of right must remain entire. In regard to the question itself, it appears from the writings produced, that in granting the feus, the Magistrates were to have right and liberty to build, limited only in one particular,—namely, the distance from the houses built in Prince's Street. The act of Council, in which this article is contained, is the basis of all the grants.—It is specially referred to in the *plan* so much insisted on by the

appellants, and recognized by many of the deeds between the parties ; and it contained the conditions of the feus sold to the appellants. It is therefore a mere pretence, to say that the appellants bought on the faith of the *plan*,—as the *plan* does not preclude the Magistrates from building on that ground, or establish in them a servitude over it. Far less does their charter, which is the limit and measure of their right, confer on them any such servitude.

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After hearing counsel, Lord Mansfield spoke :—

LORD MANSFIELD.

My Lords,

" The question now heard at your Lordships' bar, respects an injunction (interdict) granted by the Court of Session in Scotland, upon complaint of several gentlemen of Edinburgh, against certain buildings now erecting upon the ground of the late extended royalty. —The plaintiffs say that these buildings are prejudicial, not only to their private property, but to the public, who are interested in the late proposed improvements of that city, and entitled to watch over the execution of them. The Court of Session refused to continue this injunction, and to grant interdict, and against that judgment the plaintiffs now stand appellants at the bar of this House.

" I well remember, my Lords, some years ago, when the situation and improvement of this part of the kingdom came to be generally wished for and considered ; I well remember, I say, being greatly affected by the description of the inconveniences attending the capital of North Britain. This description, your Lordships have now partly heard in the case of the appellants, and, I am well informed, it is not exaggerated. I saw with pleasure many noble lords and gentlemen of the first rank, interest themselves in the matter ; and this pleasure was not diminished, by the incorporation of Edinburgh taking the lead, and giving a proper example of zeal and activity. This procedure was what it ought to have been. It gave hopes of success, and marked the character under which these gentlemen were appearing. Persons of the first rank were invited to join them, artists of the first ability to furnish them with the model, and a national contribution was proposed for defraying the expense. Committees were held, money was subscribed, and at last the attention of all parties turned to the capital improvement—the extension of the royalty upon the grounds toward the north, and the erection of a new city upon these grounds ; for this purpose an act of Parliament became requisite and was obtained by application of all concerned. I remember, my Lords, being active in bringing this bill about, although several objections possibly lay against it ; a noble Lord, now no more, had determined to oppose it ; nay, a noble Lord (Abercorn) who now hears me, meant to support this opposition. One of these objections has this moment occurred to me : The inhabitants of the extended royalty were to be excluded in the representation of the

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city, and yet lie open to be taxed by the old corporation; this was, and perhaps justly, deemed unequal and unconstitutional; yet under such colours—under such specious appearances, was the matter dressed up to me; and so much was my opinion heightened of the persons into whose hands this trust was to be committed, so much I say, were all these things impressed upon me, that I prevailed with those noble Lords to withdraw their opposition to the bill, which otherwise would not have passed into a law; and a great boon it was to the corporation of Edinburgh.

“ These gentlemen, thus aided by the nation, and empowered by the legislature itself, continued to proceed in the character expected of them. In their case, now presented to your Lordships, you are told, that after consulting with several persons of distinction and taste, they had fixed upon the general form of a plan offered them by an ingenious artist. Amongst the people of distinction and taste, there were my Lord Alemore, my Lord Kaimes, my Lord Advocate for Scotland, Mr. Commissioner Clerk, and, among other artists, the Messrs Adams no doubt. By these gentlemen, several alterations and improvements were made to this plan, and an advertisement was published by the Corporation, informing the public, that they had that day finally adjusted the Plan of the New Town, which was to lie open at the Council Chamber, for the inspection of such as inclined to become feuars.

“ In consequence of this, the appellants and others came, they viewed the plan, and chose situations for their intended houses.

“ The line of buildings termed Prince’s Street seemed soon to fill up, for a very obvious reason: The whole grounds to the south of this line were left as an open area in the plan, and delineated as pleasure grounds: The lake, or North Loch, formerly a nuisance, is there thrown into the agreeable form of a canal, with walks and terraces on each side.

“ The plan now in my hand surely ascertains every circumstance or form, better than any writing in the world,—it speaks to the eye, it presents a picture, which no verbal description can afford. So far, therefore, as appeared from the plan, it was unnecessary upon the part of the plaintiffs to propose a question; it only remained to know what was to be paid by each person for the site he had chosen. This was done by a scheme entered in a book, and this scheme made relative to the plan. By both these completely satisfied, they paid their money, and have *bona fide* upon the faith of what happened, erected houses in a manner, and at an expense, even superior to the idea of the public. After some time, the plaintiffs were surprised by the appearance of buildings upon the ground, which they always supposed destined to the health and beauty of the place; and in place of terraces and walks upon the North Loch they find a new street amaking in its way, as a peculiar favourite of the corporation, under the name of Canal Street. These gentlemen immediately bring the complaint before the corporation; they appeal to the *plan*, and

pray to be informed how such an infringement could ever be imagined, far less carried into execution ;—or how the town could allow themselves to act against the good faith of the public and express terms of their sale. Now, my Lords, what answer did the corporation make to all this;—‘ Plan !’ say they, ‘ Why, gentlemen, you have egregiously deceived yourselves, that is not the plan at all.’ ‘ No !’ say the plaintiffs, ‘ Where is it then ?’ ‘ Here,’ replied the corporation, ‘ in an act of our Council of such a date.’ ‘ Did you never see that before, gentlemen ?’ ‘ No, indeed,’ rejoined the feuars, ‘ we never did.’ ‘ Impossible,’ continue the magistrates ; ‘ You are men of business, your receipts for the money bear the date of this act ; and it is vain to say you could so far neglect, or impose upon yourselves. ‘ Why, you are to have no canal, no walk, no terrace, no pleasure ground. Here is Canal Street ! there is a coach house ! there a butcher’s shop ! there a tallow-chandler !! ’

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“ Can your Lordships approve the conduct of this corporation on the contemptible idea upon which this conduct has been endeavoured to be justified ? The plaintiffs, I am told, are men of character, and they are men of business, able and eminent in their profession. I say it, my Lords, and I am proud to do so in this house, that no class of men in this nation act with more openness, more generosity, more implicit confidence, than men of business do, when satisfied with the honour and probity of their parties. I have known many a noble Lord in this house, and sure I have done so myself, subscribe an hundred deeds without throwing our eye upon a single line of them ; and why ? Because we were well apprised and fully convinced of the honour and integrity of those who put the pen in our hands. The plaintiffs, my Lords, did not consider themselves as dealing with a committee of city lands, whose business it might be, to turn every inch of ground to immediate profit ; they were dealing with the first corporation of North Britain—a corporation acting in concert, I may say, with the nation itself. I should not, my Lords, have been surprised, although the plaintiffs on this occasion really had trusted a great deal. When a plan lay upon the table, and the faith of the corporation was pledged to the public, that this plan was finally adjusted, where lay the trust in contracting upon the terms of that plan ? or where lay the trust in enrolling themselves as tenants of the city, at a certain sum for the present and time coming ? I confess, my Lords, I would have enquired no farther ; I should never have thought of examining this act of Council. I would have considered it as a form necessary in the procedure of a body corporate, and never suspected that it contained any reservation or alteration of the plan itself, or even a single word expressed or implied contrary to that plan. I mean, my Lords, I would not have suspected that there lay concealed a low device, unworthy of the meanest committee of city lands in the nation. I need not, my Lords, go far for instances of a contrary and much more

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honourable conduct, not only observed by bodies politic, but by private proprietors, in the environs of this great city. Lincoln's-Inn-Fields was planned by the celebrated Inigo Jones, and will ever do honour to the memory of that great architect; the area or contents of this square is indeed of great extent; the property of it never was conveyed to any individual; but, in terms of the plan, it has been faithfully dedicated to its original use, dressed up into pleasure grounds, and left open for the health, the prospect, and convenience of all the proprietors around. Should the representatives of the first undertaker, upon supposition that the property of this large piece of ground vested in him, now pretend to raise new buildings, would he not be prevented by every inhabitant? Would not each person tell him that they had a previous and common right over all this ground, annexed to their property, which could not be impaired or defeated at any period whatever? And would not every judge, not only grant an injunction against such an attempt, but give judgment for the inhabitants? In vain would the respondents set forth that the area in Lincoln's-Inn-Fields was too great a waste for this great city, and that certain buildings might be erected, and persons accommodated, without actual detriment to the old inhabitants in point of health or light. If this was allowable, a prodigious sum might be raised by my Lord Grosvenor; he might raise a new line of buildings in that large square, without shutting up the windows or doors of any part of it; nay, he would leave more light and more space to the former houses than is enjoyed by any street in London. But I dare presume his Lordship never entertained an idea of this kind.

"Indeed, so sensible are the corporation of Edinburgh of the extravagance and injury of their own proposition, that they have made a merit of *limiting the chimney-tops of the new houses to a level with Prince's Street*. But are the plaintiffs to be left tenants at will to them, for the light, the prospect, and conveniences they have purchased? If they are so, it must be their own fault indeed. This, my Lords, brings me to observe, that if, after all, in the question of right remaining to be tried, it shall appear that the plaintiffs were properly apprised of these acts of Council; or, in other words, the different *plan* there laid down acceded to by them; the action, no doubt, will admit of a different consideration. The respondents, in the meantime, complain that there can be no other positive proof, except by reference to their oath. I am of a different opinion, because I see an easy remedy. It is admitted the plaintiffs are men of character and honour. In the Court of Chancery of this kingdom, a party is always entitled to an answer upon oath, without any special reference. I know indeed, that by the Roman law, a reference binds the party who makes it; and the terms of the oath are decisive. But I also know from experience, the great utility of requir-

ing an answer upon oath. Without such reference the party may refuse it; if he does so, the judge will presume against him. Suppose no such answer is demanded of the plaintiffs, I believe they will not refuse it; and if their answer is negative, I should also incline to believe it, though the respondents, after this, might be at liberty to establish the contrary against every proof they have to offer.

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" To me, my Lords, it appears from every circumstance at the time, that the plaintiffs neither knew nor apprehended any intention upon the part of the respondents of deviating from the plan finally adjusted; nay, I believe the corporation itself meant nothing of the kind at the time. Even the words of the reservation itself are sufficient to convince me; *as it is not intended at present* (say they) to feu out the ground between the south street and the North Loch. I should be glad to know what the gentlemen meant by the words *at present?* Such words were unnecessary, because the plan itself speaks this intention. Had it been marked on that plan that houses and not pleasure grounds were intended upon this area, then indeed the obligation proposed to the feuars would have been in their favour: but the feuars, I suppose, will accept of no such obligation; it would indeed require strict legal words to qualify a plan so finally and formally adjusted; for the corporation expressing themselves, *that if houses were afterwards built there, was supposing in themselves a right without reserving it;*—a right which they had disposed of by their plan—a right which they are now unable to prove with the knowledge, far less the consent, of their party.

" In this matter, my Lords, I consider the corporation of Edinburgh merely as a committee of city lands, but I would have that corporation remember that their *character* is different. If a mere committee for enriching this corporation, what title had they to a national contribution? What title to the interposition of the legislature? What the purpose of calling to their assistance noblemen of the first rank in the nation?—of advising with people of distinction and taste? No, my Lords, these things speak the gentlemen's meaning at the time. Of a sudden, however, forgetful of their character, they sink into a burgh committee—*profit* is the word—the elegance of their first plan is thrown away. *Canal Street* appears! I should be glad to know whether the gentlemen of taste I have mentioned, my Lords Alemore and Kaimes, Mr. Commissioner Clerk, and Mr. Adams, were consulted about these new erections, which I am told vie in deformity with those of the Old Town. Nay, I would ask the standing counsel at the bar, if they were advised? I have not heard them say so.

" I could say a great deal more upon this subject, but I do not choose it; and I hope we shall hear no more of the matter. Let me earnestly recommend to this corporation to call to their aid the same assistance they set out with; let them consult with their standing

**HIS MAJESTY'S ADVOCATE v. HAY, &c.** counsel, what may be for their honour, what for their interest, neither of which they seem for sometime to have understood. I give my opinion, therefore, my Lords, for continuing this injunction (interdict), not only on the plain and open principles of justice, but from regard to the public, and from regard to this misguided corporation itself.

"I therefore move to reverse the judgment of the Court of Session, and, in the technical terms of that country, to lay your order upon the Court to pass the bill of suspension, that it may be conjoined with the action of declarator, and the question of right decided."

It was therefore ordered and adjudged that the interlocutors complained of be *reversed*; and it is further ordered, that the Court of Session do pass the bill of suspension that the question of right may be decided, when the suspension shall be joined with the action of declarator.

For Appellants, *Al. Wedderburn, Ar. Macdonald.*

For Respondents, *Ja. Montgomery, Henry Dundas,  
Dav. Rae.*

(M. 11,276.)

**His MAJESTY'S ADVOCATE, on behalf of His Majesty and the Public,** - - } *Appellant;*  
**JEAN HAY, Widow of John Cuthbert of Castlehill, and her Children,** - - } *Respondents.*

House of Lords, 24th April 1758.\*

**WADSET—PRESCRIPTION—INTERRUPTION.**—A bond was granted to a party, and had lain over until within a few months of 40 years, when decree *cognitionis causa*, followed by decree of adjudication, were obtained. A claim was made on this debt 40 years after the date of this adjudication: Held, that calling the creditor in an action of reduction, declarator, and extinction of the debt, raised by a co-creditor, to which the debtor was no party, within the 40 years, and appearance of the creditor made therein, with production of his bond and adjudication to support his debt, were not sufficient to interrupt the negative prescription, in terms of the statute thereanent.

The respondents were claimants on the forfeited estate of Simon Lord Lovat, who was attainted in 1747.

\* This and the following case omitted of their proper dates.

The debt upon which they claimed was founded on a wadset, dated so far back as 1683; and the debt itself had **HIS MAJESTY'S** stood, previously to this date, on a bond granted on 11th October 1642, by Hugh, Master of Lovat, to William Paterson, for 4000 merks (or £222. 4s. 5d. sterling,) with penalty payable at the term of Whitsunday 1643. In 1647 this bond was assigned to George Cuthbert of Castlehill. From the term of Whitsunday 1643, the term of payment, till the beginning of the year 1683, no notice was taken of this bond, and nothing was done on it. It lay over until within a few months of 40 years without any demand for payment; Cuthbert then raised action against Lord Lovat and his guardians, and upon their renouncing, obtained decree *cognitionis causa* on 24th February 1683; and decret of adjudication on 30th March 1683, accumulating principal, penalty, and almost 40 years' interest.

In the meantime, the granter of the bond had died, after being infest in the estate of Lovat, and was succeeded by Hugh, an infant, against whom and his guardians the action above referred to was brought.

The last Hugh Lord Lovat died in 1698, without issue male, leaving four daughters, the eldest of whom was married to Alexander Mackenzie, son of Roderick Mackenzie of Prestonhall, one of the Senators of the College of Justice.

Lord Prestonhall having purchased several encumbrances on the estate of Lovat, on which he passed four several infestments, brought, as a creditor of the Lovat estate, an action of reduction, improbation, and declarator against the other creditors, who appeared from the records to have charges of debt against the estate, in order to ascertain the extent of the debts; and that it ought to be found that the said bonds, adjudications, &c. had been paid, or were destitute of the legal solemnities, or were false, or forged, and the estate disburdened of the same.

George Cuthbert was made a party to this suit, and appeared and produced the original bond and assignation above mentioned, and referred to the record for the two decrets of constitution and adjudication. Upon this action avizandum was made, and thereafter decree reducing all the writs specially called for, and of which production had not been made; but exempting therefrom the present claim, as to which sufficient production was made. Nothing further was done by George Cuthbert.

Alexander Mackenzie, husband to Lord Lovat's eldest daughter, possessed the estate of Lovat in his wife's

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**HIS MAJESTY'S  
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right, and also as in right of his father, Lord Prestonhall, the incumbrancer, until his attainder in 1715.

**v.  
HAY, &c.** In 1710, a submission had been proposed, and Alexander Mackenzie granted bond binding and obliging himself to procure Lord Prestonhall's consent agreeing to submit all law suits, claims, &c., due to George Cuthbert, including the action of reduction above referred to, and particularly a wadset right which George Cuthbert had over the lands of Achnagairn, part of the estate of Lovat, to the arbitration of Robert Frazer. The submission was written out, but before being signed, Lord Prestonhall died.

George Cuthbert died, and was succeeded by John Cuthbert, the respondent, Jean Hay's husband. Her husband died, after making a settlement, in 1732, in her favour, for behoof of her younger children. He took no notice of this debt in the settlement, which had now accumulated to a large amount (£4180), nor had he ever made any demand for payment during his life.

After the estate of Lovat, however, was forfeited, the respondent, for the first time, and under certain general words in the trust-deed, raised and obtained decret of adjudication in implement against the heir of her husband of the adjudication of 1683, whereupon the present claim was made in 1749. Thus the whole claim is founded on a bond 115 years old—this bond having been neglected almost for 40 years before any step was taken, and then only the adjudication of 1683 was obtained; and thereafter the debt was again neglected for 66 years, until the present claim was made. In these circumstances, the appellants contended, 1st, That the claim was totally barred, that, if it was ever due, there was a legal presumption either that it was totally paid and discharged, or that it was unjust; and, 2d, That the debt was cut off by the negative prescription,—no document having been taken thereon from the adjudication in 1683 to the date of the present claim in 1749. He founded on the negative prescription of obligations established by the act 1469, c. 29, and repeated by the act 1474, c. 55, declaring that the person having interest in an obligation, shall follow forth the same within the space of 40 years, and take document thereon. As well as the act 1617, which declares, "And sicklike his Majesty, with advice foresaid, statutes and ordinances that all actions competent by the law upon heritable bonds, reversions, contracts, or others whatsoever, either already made, or to be made, after the date hereof, shall

"be pursued within the space of 40 years after the date of  
"the same."

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It was answered by the respondents, that there was no reason to suspect that the debt now claimed was satisfied, because it appeared from the public records that the family of Lovat, from the time of granting the bond in question till the year 1734, had been in continued distress; their estate overwhelmed with debts, and the heir in possession constantly in poor circumstances, which sufficiently accounted for the lapse of time, and also presumed that the debt was not paid. That in answer to the plea of prescription, it could not be pleaded, as the legal interruptions, by the decree of adjudication taken on the debt in 1683, and the appearance made in the action of reduction brought by Lord Prestonhall, and production therein of the grounds of debt in 1709, by the respondents' ancestor, sufficiently elided the plea. To this it was replied, that the adjudication was of no avail, as it was prescribed itself; and that the production of the bond and assignment in Lord Prestonhall's action in 1709 was no legal interruption of prescription, the act requiring "the party to whom the obligation is made, that has interest therein, shall follow the said obligation, and take document thereupon;" and that even decret of registration upon an obligation, with letters of horning thereon, was decided to be no interruption of prescription.

At first the Court, on report of the Lord Ordinary, sustained the objections made to the claim, holding that the plea of prescription was good, and that the "documents produced did not interrupt prescription."

Mar. 9, 1756.

and

On further advising, with a further production of the bond of submission, they altered the above judgment, and sustained "the interruptions of the prescription founded on, July 27, 1757. and remit to the Lord Ordinary to proceed accordingly."

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellant.*—1st, The circumstances of the present case amount to a legal presumption, that the debt now claimed was either originally unjust, or had been long ago paid: and of themselves are sufficient, without any collateral aid, to determine the question, and to establish that the adjudication 1683 ought to be considered as a satisfied incumbrance, and as such, to attend the inheritance. The bond, the original voucher of debt, was granted 116 years ago, and interest is now claimed for all that time. For

almost 40 years this bond lay totally neglected, without any His MAJESTY's demand of payment; at length, in 1683, when the heir of the <sup>ADVOCATE</sup> family had renounced the succession, and consequently *in v. hoc statu* it was not competent to him or any other person to dispute the debt, this bond was again revived by George Cuthbert, as assignee of the original creditor, and an adjudication *cognitionis causa* obtained for the purpose of charging the estate of the grantor. From that date, till the time when the present claim was made—a period of 66 years,—was the debt again deserted. And although this debt was greater in amount than all the funds which John Cuthbert had, put together, yet, on making his settlement before his death, he makes no allusion to it whatever. All this is allowed, although in the interval other creditors adjudge, and attempts were made to carry off the estate by expired apprazings. If this bond existed, it cannot be supposed that George Cuthbert, or his son, who lived in Lord Lovat's neighbourhood, would have quietly looked on, and seen all this without attending to their own interests, and securing themselves for their own debts. 2d, The debt now claimed is, besides, barred by the negative prescription, no legal document having been taken thereon from 1683, the date of the adjudication, till the present claim. The appearance made in 1709, in Lord Prestonhall's action, is no legal interruption of prescription, the act requiring expressly, that document must be taken by the creditor against the debtor, as the only *following forth of the debt*, according to the natural meaning of the act, and to the construction established by practice. Here no document of *following forth the debt* was taken by the creditor; he only appeared as a defender, to an action brought by another creditor of the common debtor, who was neither owner of the estate, nor liable to payment of the debt; no other proceedings were had on the part of George Cuthbert, than the appearance and production of his vouchers of debt; there the matter rested. And, with respect to Alexander Mackenzie's obligation as to the submission, it does not alter the case; he was neither owner of, nor had any power over the estate: The engagement was for another person, and by his disapprobation became ineffectual; and even though it had been completed, yet as *none of the parties* were either *owners of the estate*, or *liable in the debt*, it cannot be an interruption of prescription, within the words and sense, or established construction of the act 1469.

*Pledged for the Respondents.*—It is sufficient to save against prescription, that the person claiming under the obligation ~~HIS MAJESTY'S~~ should do some act and deed, by which an intention is manifested, or denoted, not to desert or depart from it; but, on the contrary, to insist on his right or claim. Such being the evident import of the statutory words of *taking document on, and following and pursuing the obligation*, it is to be presumed, that where the justice of the debt is clear, courts of justice will hold such proceedings as were here taken, to be sufficient to bar the plea of prescription. In this case, no prescription attached, or could apply until forty years after the day of payment on the bond. But, before the forty years had expired, it clearly appears, that action was raised on the bond, which is sufficient of itself to elide prescription, and this action was followed by a decree of adjudication, which is likewise a sufficient taking of document upon the debt in 1683. But, further, prescription was further interrupted by exhibiting and producing the said adjudication and bond now claimed, in the action of reduction improbation and declarator brought by Lord Prestonhall in 1709; which was entering the lists in competition, and taking one of the strongest documents that can be conceived, upon the debt in question, because thereby the party claimed and insisted upon his debt and adjudication, as a just and real subsisting incumbrance upon the estate of Lovat, out of which he was entitled to receive payment and satisfaction, preferably to any right or title, debt, or incumbrance, standing in Lord Prestonhall's person upon the same estate. So many of the judges in the Court below viewed the question when the interlocutors appealed against were pronounced, disallowing that these *per se* were sufficient to interrupt prescription: Thus then, there are not only acts and *deeds of the creditor* in the way of *taking document upon, and following and pursuing his right and claim*, but there are also the strongest *acts of the debtor* and party then liable for the debt, owning and acknowledging the same, all which, it is maintained, are a sufficient bar to prescription. Such is the obligation for a submission, granted by Frazerdale, heir-apparent of Lord Prestonhall, which expressly acknowledged the debt, and referred to the foresaid reduction and proceedings therein, wherein that debt was insisted in and claimed. And the whole other circumstances of the family—the writs and writings referred to, demonstrate that the debt is due, and not prescribed.

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*v.*  
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1710.

After hearing counsel, it was

Ordered and adjudged that the said two interlocutors of  
**HIS MAJESTY's** 13th July 1756, and 27th July 1757 be reversed, and that  
**ADVOCATE** the respondent's claim be dismissed.  
*v.*  
**HAY.**

For Appellant *C. Pratt, Rob. Dundas, C. Yorke.*  
 For Respondents, *Edward Starkie, Ro. Mackintosh.*

**His MAJESTY'S ADVOCATE,** - - - *Appellant;*  
**JEAN HAY, Widow of John Cuthbert,** *Respondent.*

House of Lords, 26th April 1758.

**ADJUDICATION AND INFESTMENT—PRESCRIPTION—INTERRUPTION.**

A bond was granted by a party to his creditor, upon which adjudication, charter, and infestment followed, this adjudication comprising several other separate debts; the bond debt lay over for 66 years, when the present claim was made, and the negative prescription pleaded against the adjudication: Held that a claim made before the Government Commissioners of Enquiry on forfeited estates and registration thereof, together with a submission, followed by decree-arbitral, entered into by the debtor with one of the creditors in the separate debts comprised in this adjudication, and assignation of that debt by him to the debtor within the 40 years, were sufficient to interrupt the negative prescription in regard to the debt, it being one of those comprised in the adjudication thus acknowledged by the debtor.

**Nov. 6, 1690.** Hugh, Lord Lovat, granted bond, of this date, for the sum of 1600 merks Scots, payable at the term of Martinmas then following, in the year 1691, to the Bishop of Murray, his heirs, executors, or assignees.

**1703.** In 1703, this bond was assigned to Robert Frazer, advocate, which appears to have been done in trust, and for the **Feb. 9, 1703.** Bishop's behoof; as appears by letter, of this date, under Frazer's hand, declaring that this bond was "assigned in trust "to me for your behoof."

**Nov. —.** On 18th November 1703, the said Robert Frazer, upon the above bond, as well as upon other bond debts assigned to him in trust, and a bond debt due to himself by Lovat, obtained decree *cognitionis causa* against Lady Frazer of Lovat, eldest lawful daughter of Hugh Lord Lovat, the debtor then deceased. In this decree there was comprised a bond, granted by Hugh Lord Lovat, to James Frazer of Phopachy, dated 16th April 1694, for the sum of 1800 merks, which was afterwards assigned to Robert Frazer, in trust for Alex-

ander Frazer, for the purpose of doing diligence for his use  
and behoof.

Upon the above decree *cognitionis causa* adjudication fol-  
lowed, against the estate of Lovat for the several debts com-  
prised therein ; and charter of adjudication and infestment  
duly recorded, of these dates.

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Jan. 26, 1704.

May 9 and 26,  
1704.

The Bishop of Murray, reciting the bond granted by Hugh  
Lord Lovat ; and the assignation thereof in trust to Robert  
Frazer, did, of this date, assign the said bond to John Stew- Mar. 14, 1707.  
art, merchant in Inverness ; and he, of same date, granted  
back bond, acknowledging that the same was granted and  
assigned to him by the Bishop, for behoof of Jean Hay the  
respondent, and her children, and binding himself to denude  
in her favour.

In the meantime, titles had been made up in the name of  
Lord Prestonhall, whose eldest son, Alexander Mackenzie,  
had married the eldest daughter, and heir to the estates of  
Hugh Lord Lovat, against whom the decree of *cognitionis  
causa* was obtained.

After this, the title of Alexander Mackenzie was made up,  
after his father had purchased several of the debts and en-  
cumbrances on the estate. He himself also purchased in  
several other adjudications. Thereafter Alexander Mac-  
kenzie was attainted, for joining in the rebellion of 1715, and  
his estates forfeited. 1706.

In 1718, the executor of Robert Frazer, who had constitut-  
ed the above debts against the estate of Lovat, lodged a  
claim before the Government Commissioners of Enquiry, set-  
ting forth several debts, and among the rest, the 1600 merk  
bond of 1690 in question. It was duly registered as a claim  
by the Government Commissioners on Lovat's estate, the life-  
rent interest which Alexander Mackenzie had therein being  
involved in his forfeiture.

In 1736, Stewart disposed this bond to the respondent, 1738.  
for behoof of her children.

In 1738, Simon Lord Lovat, who had succeeded to the  
estates, and Robert Frazer, grandson of James Frazer of  
Phopachy, the grantee in the bond of 1694 for 1800  
merks, comprised, as before mentioned, in the adjudication,  
did enter into a submission to William Grant, and James  
Fergusons, Esqs., advocates, as arbiters, whereby these  
gentlemen, in terms of the submission to them, and after  
discussion had therein, decerned and adjudged the said Lord  
Lovat to pay to the said Robert Frazer the sum of £1000

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in satisfaction of his several claims, including that in the adjudication, and they thereby ordained him to grant Lord Lovat an assignation to the said bond of 1800 merks, contained in the said adjudication of 1704, and adjudication itself to that extent. This was done; Robert Frazer received his money, and discharged and assigned to him accordingly.

In 1747, Lord Lovat was attainted of high treason, and his estates forfeited; and the present claim on the 1600 merk bond was made by the respondent in 1749, in pursuance of the vesting act thereanent, saving the right of lawful and just creditors.

It was objected to the claim by the appellant, on behalf of the Crown, that no document having been taken on the debt, from the date of Robert Frazer's adjudication in 1704, until the entry of the present claim, the same was prescribed and barred by the negative prescription. To this objection it was answered, that the adjudication obtained by Robert Frazer in 1704, having been completed by charter and sasine, became a right of property, against which the negative prescription could not run; that the lodging this claim against the Lovat estate, in pursuance of the vesting act in 1715, before the Government Commissioners of Enquiry, and the registration thereof by them, was equivalent to pursuing the debt; and that the foresaid submission entered into between Lord Lovat and Robert Frazer in the year 1738, and the decret arbitral pronounced therein in 1739, were documents taken upon the adjudication, and which must preserve the whole adjudication, though comprised of distinct and separate debts, as to the right of every person therein, as well as the particular claims thereby submitted and adjudicated on. And further, that it appeared from the disposition and translation by John Stewart to the respondent Jean Hay in the year 1736, that he, Stewart held this bond in trust for the behoof of *her children*, who being all minors, and the years of minority being deducted, the negative prescription could not apply to them.

July 27, 1757. The Lords found, on report of Lord Prestongrange, unanimously, "that the bond for 1600 merks, with the adjudication, charter and infestment thereon, are not cut off by the negative prescription."

Against this interlocutor the present appeal was brought. *Pleaded by the Appellant.*—The act of parliament 1469, establishing the negative prescription, declares, "That the party to whom the obligation is made, and who has in-

"rest therein, shall follow the said obligation within the space of forty years, and take document thereupon, and if he does not, it shall prescribe, and be of none avail." In the present case, the bond was granted in 1690, and adjudication in 1704, and from that time till the present claim, the obligation was not followed, nor document taken thereupon; the negative prescription, therefore, strikes against the adjudication of 1704, as well as the bond, and this claim ought to be dismissed. Because the several circumstances which are now pleaded as interruptions of the prescription, are not only out of the words and established construction of the act of parliament, but are also contrary to the reason, spirit, and evident intention of that act: for, admitting them to be true, yet all, except the pretended minority, were the acts of third parties, who had no concern with, and were strangers to the debt in question; the preserving of this debt was not the end of the acts done, nor so much as thought of by the parties; and, under these circumstances, it would be straining the act of parliament to extend them by implication to the cases of creditors *following the debt*, or *taking document thereon*, more especially as the respondent could not be prejudiced by the act of the other creditors. Besides, the several debts in the adjudication 1704, must stand or fall on their own merits, without communicating any additional strength or weakness to each other. They were due to different parties, and for different considerations, the interest of these parties being distinct, the adjudication, in respect to them, came to be considered in the same light as if each party had taken out a separate adjudication. Robert Frazer had no interest in the debt claimed, nor any power from the creditor; besides, it does not appear that his claim was entered within the time limited by law. The plea of interruption founded on minority of the respondent's children, came too late, after she had entered her claim under the assignation of 1737. It does not appear that they have any interest, for the assignation of 1707, wherein the right to them is alleged, has not been adduced, and the recital thereof in the assignation of 1736 is not sufficient, so that the conveyance appears only to herself, and for her own behoof.

*Pleaded for the Respondent.*—That this bond originally was assigned to Robert Frazer, for the purpose of suing diligence thereon, and taking adjudication for the same against the estate of Lovat, with the view to make the same

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**HIS MAJESTY'S ADVOCATE v. HAY.** a permanent and real security thereupon ; and ever since then the estate of Lovat has been in such a situation as to preclude the possibility of creditors obtaining payment of their debt ; the plea of prescription, therefore, cannot apply to this debt, because, 1st, It is barred by the infancy of the respondent's children, in whose favour and for whose behoof Stewart held the bond in question, which minority being deducted from the period of prescription calculated from the date of the adjudication in 1704, totally excludes the plea. 2d. It is also excluded by the several acts done by Lord Prestonhall, and by Lord Lovat in purchasing and taking conveyances of the several debts included in the same adjudication with the debt in question, which is an acknowledgment of the adjudication to the effect of avoiding the plea of prescription as to the whole ; and, 3d. It is further interrupted by the lodging of the claim before the Government Commissioners of Enquiry for the forfeited estates ; this being, with the registration of that claim, equivalent to an action or process raised on the debt.

After hearing counsel, it was  
Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*

For Respondent, *Edward Starkie, R. Mackintosh.*

**Note.**—These two cases derive importance from various considerations. The *first* seems to authorize the inference, that nothing will be sufficient to interrupt the negative prescription, except some proceeding, in a question *with the proper debtor in the obligation*, within the years of prescription. In that case, certain proceedings had taken place in a process of reduction and declarator of extinction of the debt, as between a *co-creditor* of the common debtor, but to which that debtor himself was no party, and these were held not to interrupt the running of the prescription, so far as he was concerned. But, in the *second* case, (which is not reported in the Court of Session reports,) the recognition of a debt as subsisting, was inferred from the parties acquiring right to a decree of adjudication and other documents, in which that debt was contained, though they obtained no right to this debt itself. Such recognition of the debt, though merely inferred, in the manner now noticed, by the proper debtor, was held to interrupt the negative prescription. And this seems to give a latitude to the express words of the statute as to *following furth, or taking document upon the debt.*

But these cases now reported, derive considerable additional im-

(M. 13,132.)

1772.

PATRICK CAMPBELL of Knapp, and Others,  
 Burgesses and Inhabitants of the Burgh } Appellants :  
 of Campbelton, - - - - }  
 JOHN HASTIE, Rector or Head-Master of the  
 Grammar School of Campbelton, - - - Respondent.

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 CAMPBELL, &c.  
 v.  
 HASTIE.

House of Lords, 14th April 1772.

**PUBLIC OFFICE—SCHOOLMASTER IN BURGH—APPOINTMENT.**—A schoolmaster, appointed by the Magistrates and Town Council of Campbelton, without any mention being made as to whether his office was for life or at pleasure: Held that it was a public office, and that he was liable to be dismissed for a just and reasonable cause, and that acts of cruel chastisement of the boys were a justifiable cause for his dismissal; reversing the judgment of the Court of Session.

The respondent was engaged as rector and head-master of the grammar school of Campbelton, which, belonging to

portance, from a discussion regarding them, which has recently occurred, in a case now depending before the Second Division of the Court of Session, upon a report by Lord Wood. In the printed pleadings in that case, which has not yet been decided, the cases now referred to, have undergone very ample discussion. This is the case of *M'Neill or Morison v. Yorston*, the printed pleadings of which bear date November 1849,\* and one of which is drawn by Professor More: The circumstances are these:—In 1748, Neil M'Neill obtained a wadset over lands in the island of Gigha for £410 sterling. The wadsetter had four sons, Donald, John, Hector, and Malcolm, and two daughters, Janet and Mary. Heritable securities, which were followed by inseftment, were granted in favour of those sons and daughters, so as to create a subordinate security over the wadset right, to the full extent of £410 covered by it. Neil M'Neill, the original wadsetter, died in 1749, and was succeeded by his eldest son Donald M'Neill, who made up a title, as his father's heir, to the original wadset, and in 1775 he disposed this wadset to John Cowan. The lands of Gigha, over which this wadset extended, were sold to Sir Archibald Campbell, who also purchased the wadset from Cowan, and obtained right thereto in 1779. In the meantime the subordinate heritable securities which had been constituted in favour of Neil M'Neill's children, and which exhausted the £410 contained in the wadset, had been entirely overlooked by all parties; but, having been discovered upon a search of the records, Sir Archibald Campbell applied to Cowan to produce discharges of these heritable securities. An action of reduction and declarator of extinction of

\* It is understood that the death of one of the parties has prevented the Court from deciding this case.

1772.

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CAMPBELL, &c.  
v.

HASTIE.

June 4, 1760.

the corporation, was under the management and direction of the magistrates and town-council. He was admitted, of this date, and was to receive a salary over and above fees,

these heritable securities was then brought against the children and representatives of Neill M'Neill, the original wadsetter, in which it was maintained, 1st, That the original wadset having been dissolved by a regular order of redemption, the subordinate heritable securities grafted on this wadset, fell to the ground, and ought to be set aside. 2dly, It was contended that the sums in these heritable securities had been paid and extinguished. This action was raised in 1791.

At first Lord Swinton, as Ordinary, pronounced an interlocutor finding that it was incompetent for a wadsetter to create a subordinate heritable security upon the wadset right; but he afterwards altered this interlocutor, and found that the wadsetter "had full power to burden the said lands to the full amount of the principal wadset;" and the Court adhered to the Ordinary's interlocutor, upon advising a reclaiming petition, with answers. It was thus decided, that such subordinate heritable securities were, like feu-rights, separate heritable burdens, ingrafted on the principal right. This case, so far as this point is concerned, is reported in the Dictionary, p. 16,555.

The case then turned upon the question, as to whether these heritable securities had been extinguished *by payment*, and after various proceedings before the Lord Ordinary, it fell asleep subsequent to 1799. But it ultimately turned out that there had been no payment of these securities, and in 1818 Mr. M'Neill, then the proprietor of Gigha, granted a precept of *clare constat* in favour of Neil M'Neill, the son of Malcolm M'Neill, who was the youngest son of the original wadsetter, as the *heir of line* of his said deceased father, and also of his deceased uncles, John and Hector, and of his aunt Janet, to the respective heritable securities held by them. And Neil M'Neill received payment of their shares of the heritable bonds. By the precept of *clare constat* Mr. M'Neill of Gigha admitted the subsistence of the debts, but it was overlooked that these heritable debts were payable, not to the *heir of line* of the creditors, but to the *heir of conquest*.

Consequently, Janet M'Neill or Morison, the daughter of Donald M'Neill, the eldest son of Neil M'Neill, the original wadsetter, being, in right of the father, the *heir of conquest* of these deceased creditors, and not having heard of the proceedings above mentioned till 1836, then wakened the process of reduction and declarator, and also, after serving herself *heiress of conquest* to her deceased uncles and aunt, raised an action for payment of the heritable debts due to them.

In defence against this action it is pleaded that any claim at her instance was cut off by prescription, in respect no proceedings had

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of £30—£20 of which was to be paid out of the common good of the burgh, and the other £10 to be paid by the allowance made by the Commissioners of Supply for a parochial school. In consequence of neglecting his school, and the proper education of his pupils, and entering into occupations incompatible with its efficient management, and particularly, in consequence of severe chastisement and maltreatment of the pupils, to the great danger of their lives, the magistrates, after a due investigation and proof led of the facts, dismissed him, of this date. The proof led before Aug. 18, 1767. his dismission went to show that he resorted to cruel methods to correct his scholars—that scarce a day passed without some of the scholars coming home to their parents with their heads cut, and their bodies discoloured. Instead of employing ataws

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been taken by her for greatly more than 40 years after the date of the securities. This raised the question, Whether the proceedings, in the reduction and declarator, to which she had been called as a defender, did not interrupt the prescription? and also, Whether the acknowledgment of the proper debtor in the heritable securities, as to their subsistence, (by the precept of *clare constat* alluded to,) though made to a wrong heir, did not also bar the prescription? Various other pleas were also stated, to which it is here unnecessary to advert. But it was pleaded, on the authority of *Robertson*, 27th November 1751, that Donald M'Neill, the father of Mrs. M'Neill or Morison, having acquired the original wadset, in right of his father, and being also the heir-apparent of the creditors in the heritable bonds above mentioned, the latter were extinguished *confusione*. It turned out, however, on a careful examination of the pleadings in the case of *Robertson*, that this case must have been erroneously reported, as the pleadings shew, that the decision must have turned not on the doctrine of *confusio*, but on the ground of the wadset in that case having been radically null, and so neither requiring, nor admitting of any title being made up to it.

Lord Wood, in reporting the case now referred to, says that “ both the plea of prescription and the other pleas of the parties, present points of considerable importance, apparently not free from difficulty, and which deserve the consideration of the Court.” He further says : “ The Lord Ordinary is inclined to be of opinion that prescription was interrupted. At the same time, the case of *Hay*, 9th March 1756, (M. 11,276,) and House of Lords, 24th April 1758, and of *Wright*, 11th December 1717, (M. 11,269,) may be thought to be adverse to this decision. It, however, occurs to the Lord Ordinary that there is room for soundly distinguishing between them and the present case.”

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or strop, he beat the pupils with wooden squares, sometimes with a ruler, and sometimes with his fists, and used his feet by kicking them—knocked them on the head, pinched their ears with his nails, until the blood came—dragging them by the hair of the head. Under this maltreatment the boys often came home with cut heads and hands, swollen faces, bleeding ears, and discoloured bodies. He had also entered into the trade of cattle grazing and farming—dealt in black cattle—in the shipping business—and in herring fishing. There were too many holidays and play days given, and the hours were ill attended and much shortened.

In consequence of all these, the scholars were taken away from the school, and the school fell off.

The respondent brought an action of reduction to set aside his act of dismission, on the ground that the magistrates and town-council had no jurisdiction, as a court, to try the question, and therefore their proceedings were incompetent. The Lord Ordinary offered him a proof of his reasons and grounds of reduction; but this he declined, choosing rather to stand on the incompetency of the procedure, upon which informations were ordered to be lodged.

The respondent contended, that being formally admitted, without any limitation as to the pleasure of the magistrates, council, or heritors, the grant of his office was simple and absolute, and he must be considered to have held it *ad vitam aut culpam*. 2dly, That the town-council of Campbeltown are not competent, in a matter of this kind, having no jurisdiction civil or criminal. 3dly, That some of the members of the town-council had been admitted as witnesses against him, though they afterwards came to judge in his dismission. That it was not clear who were his prosecutors, the complaint being made in the name of gentlemen only, without mentioning who were meant to be comprehended under the word *others*, and perhaps the magistrates themselves, for aught that appeared, might be included under that term. The appellants answered, that he was appointed to the office of schoolmaster by the magistrates and town-council. He was subject to their control, as a public servant of the burgh, and consequently could be dismissed by them at pleasure. His act of admission neither bore the office to be for life, nor for any definite period. In removing him they have only exercised a just control over the sacred interest intrusted to their care. Had they done so without reason or cause, then the respondent might have

had some grounds for complaint; but, in the present case, there were very heavy and grave charges made against the schoolmaster; nor were these hastily listened to and summarily disposed of. The respondent was repeatedly warned and admonished of the danger and consequences of his conduct, ere the final act of dismission was resorted to. Although it was found, in the case of Magistrates of Montrose Jan. 18, 1710.  
*v.* Strachan, their schoolmaster, where the latter enjoyed his appointment in similar terms to the present, that the Magistrates could not dismiss the schoolmaster at pleasure, yet the Lords found, “*that for any just and reasonable cause they might*: And ordained the magistrates to condescend “on a just and reasonable cause for removing the suspender.” In the present case, the proof, as adverted to above, was the most just and ample reasonable cause that could possibly be adduced for warranting the magistrates to dismiss the schoolmaster. Other causes have occurred supporting the same principle.

The Court, of this date, (29th June 1769,) repelled the objections to the competency of the proceedings, and remitted to the Lord Ordinary to proceed in the cause.

A discussion then took place before the Lord Ordinary, chiefly on the effect and import of the proof.

Of this date, the Court pronounced this interlocutor:— Nov. 15, 1770.  
 “Upon report of Lord Pitfour, and having advised the memorials, the Lords repel the reasons of reduction, and assoilzie the defendants, and decern.”

A reclaiming petition being presented, pleading compassion, and praying the Court to take a middle course, and repone him to his office, with the punishment of being three years deprived of his salary, which would sufficiently atone for his errors. Whereupon the Lords, of this date, “reduce Dec. 21, — the decret of deposition, and repone the petitioner to the office of schoolmaster of Campbeltown: But, in respect of some irregularities in his conduct, find he is not entitled to the bygone salaries of his office since his deposition, and decerns and declares accordingly, and find no expenses due.” The appellants having reclaimed against this interlocutor, the Lords refused the prayer of the same, “and ad- Jan. 22, 1771. here to their former interlocutor reclaimed against.”

It was against these two last interlocutors that the present appeal was brought.

*Pleaded for the Appellants.*—The frivolous objections stated by the respondent against the proceedings before the

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Magistrates of Edinburgh v. Sir William Thomson, Feb. 14, 1665. Foulis, Nov. 10, 1747. Harvey v. Kirk-Session of Glasgow, 1750.

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magistrates, are now out of the question,—the respondent having aquiesced in the interlocutors repelling these objections. In law, the magistrates and town council of a burgh, having the appointment of a schoolmaster, and other servants, and exercising that right, without expressing in the admission, or appointment, whether it is to be for life, or pleasure, can remove them for *any just and reasonable cause*. This point has been settled by several decisions, and that the magistrates, besides, are the judges of this just and reasonable cause. The dismission, in the present case, was not without a just and reasonable cause, but proceeded from causes of the most just and serious kind, such as reasonably justified his deprivation. It is only necessary to refer to the respondent's barbarity and inhumanity in the punishment of his scholars, as exhibited by the proof adduced, to shew this. And the respondent, although repeatedly offered a proof, has never attempted to justify or excuse his conduct. Besides, his inattention and neglect of his scholars, arising from entering into engagements in business incompatible with that care requisite in a proper and efficient teacher of youth, was in itself sufficient to justify his dismission.

*Pleaded for the Respondent.*—His engagements in trade and farming, which were so trifling, could not afford a just and reasonable cause for his dismission, unless it led to the consequential neglect of the school, and his scholars; but, in place of this, when the school was examined by the clergy, it received the warm approbation of the examinators. And as to chastisement, it must be admitted that a schoolmaster ought to be allowed a certain power and control of chastisement for the purpose of discipline. Without it no school could exist; and the question is, how far this power ought to be exercised in cases of ferocious and rebellious behaviour on the part of the boys. In the present case, no excess was resorted to,—no inhuman barbarity inflicted; but when pupils, as in this case, turn round, and swear and curse at the master, and wrestle with him, some latitude must be allowed for smart correction on such occasions. Unless the discipline of a school is maintained by some means, the authority and usefulness of a master are gone. He can no longer be a teacher of youth, and all learning will give place to insubordination and misrule. A schoolmaster, it is true, must not be a barbarian—must not maim his scholars, or treat them with heartless cruelty; yet, without corporal punishment to a certain extent, no school can possibly exist. The respon-

dent submits, that he has not exceeded the proper bounds of chastisement conceded to all schoolmasters; and therefore his appointment, being in its nature one for life, he cannot be removed at the pleasure of the magistrates, without some more justifiable cause than has yet been established,

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After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be reversed.

For Appellants, *Ja. Montgomery, Henry Dundas, John Dalrymple.*

For Respondent, *Andrew Crosbie, James Boswell.*

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JAMES CHEAP of Leith, and Others, Executors  
of THOMAS CHEAP, late Merchant in Lon- } Appellants;  
don, deceased, - - - - - }  
ANDREW AITON and Company, Merchants, } Respondents.  
Glasgow, - - - - - }

House of Lords, 11th December 1772.

**DISSOLUTION OF COPARTNERSHIP—LIABILITY OF REPRESENTATIVES OF A DECEASED PARTNER, FOR GOODS ORDERED IN COMPANY'S NAME BY ONE OF THE PARTNERS, IN ALLEGED IGNORANCE OF HIS DEATH.**  
—Circumstances where representatives of a deceased partner not held liable for goods so ordered, and furnished after the death was known to the sellers. Reversing the judgment of the Court of Session.

The company of Messrs. Adair and Cheap, merchants in London, was dissolved by Thomas Cheap's death, who was killed in the expedition to Bellisle, in April 1761, and the account of his death published in the London newspapers of 23d May 1761.

His partner Adair had, on the 26th March previously, ordered by letter, signed in the social name of "Adair and Cheap," a considerable quantity of lawns and other goods, from the respondents, to which they answered on the 1st April; "The clear lawns you order, shall be sent as soon as we have them from the bleaching," and addressed their letter to Messrs. Adair and Cheap.

On the 21st May, Mr. Adair gave a second order, in the name of "Adair and Cheap," he then being ignorant of the death of his partner.

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On the 10th June 1761, after the death of Thomas Cheap was published, a considerable part of the goods were sent, which were ordered by the letters both of 26th March and 21st May 1761, amounting to £250. 13s. In the invoice sent along with these, they appeared invoiced to Charles Adair alone, and not to "Adair and Cheap," as follows: "Mr. Charles Adair, bought of Aiton, Blackburn, and Col-vill;" and on the margin, where the direction marks are put, "C. Adair, London, pd. to N." And on the 22d July 1761 the remainder were sent in the same manner, amounting in value to £41. 9s. 10½d.

Sometime thereafter Charles Adair became bankrupt, and the respondents ranked on his estate for their whole debt, including both goods previously sent, as well as the goods sent by the orders of 26th March and 21st May 1761.

They afterwards raised the present action for the balance (£389. 7s. 4d.) against the representatives of Thomas Cheap, the appellants. In defence, it was stated, that they were not liable for the goods ordered by Charles Adair of 26th March and 21st May 1761, and furnished on 10th June and 22d July thereafter, when by that time the respondents were acquainted with the death of Thomas Cheap, because the partnership was then known by them to be dissolved; and they, in evidence of this, had invoiced these goods, not to the firm of "Adair and Cheap;" but to Charles Adair alone. The question thus came to be, Whether the appellants, as representatives of Thomas Cheap, were liable for the value of the goods ordered on 26th March and 21st May?

July 5, 1768. The Lord Ordinary pronounced this interlocutor: Find "the defenders (appellants) liable to pay the pursuers the "price of the goods commissioned on the 26th March 1761, "and sent by them on the 10th June thereafter; but found "that they are not liable for the price of the goods commis-sioned on the 21st May, and sent by the pursuers on the "22d July said year."

Both parties represented against this interlocutor. And, in the meantime, the appellants having admitted that a cer-tain balance was due, the respondents insisted on an interim decree for that admitted sum, which was obtained of this date. Against this a representation was also lodged.

Thereafter the Lord Ordinary pronounced this interlo-cutor, finding "The defenders liable to pay to the pursuer "the price of the goods commissioned on 26th March 1761,

"whether sent in June or July thereafter, but found them  
 "liable in no part of the goods commissioned on 21st May  
 "1761, and refused the desire of the defenders' representa-  
 "tion, reclaiming against the said interlocutor of 4th August  
 "1768, and adhered thereto."

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Reclaiming petitions being lodged by both parties, the whole Lords "adhered to the Lord Ordinary's interlo- Mar. 2, 1769.  
 "cutor reclaimed against, so far as they find the defenders  
 "liable to pay the pursuers (respondents) the price of the  
 "goods commissioned on 26th March 1761, with interest  
 "from and after year and day after the date of the furnish-  
 "ing thereof, till payment; and further find the defenders  
 "(appellants) liable also to pay to the pursuers (respondents)  
 "the price of the goods commissioned on the 21st of May  
 "1761, with interest from and after year and day after the  
 "date of the furnishing thereof, till the payment, and de-  
 "cerned." Against this interlocutor three reclaiming peti- Mar. 11, 1769.  
 tions were presented and refused. Feb. 1, 1770.  
 Feb. 21, —

Against these interlocutors the present appeal was brought.\*

It was

Ordered and adjudged that the aforesaid interlocutor of the 4th August 1768, and so much of the subsequent interlocutors as adhere to the same, be, and the same are hereby affirmed; and that the whole other interlocutors, as well of the Lord Ordinary as of the whole Lords of Session, in so far as respects the other points in the cause, be, and the same are hereby reversed. Reserving to the respondents, the said Aiton and Company, their relief, and all claims and demands competent to them, from or out of the estate of Charles Adair, in the said petition of appeal mentioned.

For Appellants, *Al. Wedderburn, R. Perryn.*

For Respondents, *E. Thurlow, Thos. Lockhart.*

\* The argument is well reported in Morison 14,573.

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ANDREW WAUCHOPE, Esq. - - - Appellant;  
 Sir ARCHIBALD HOPE, Capt. JOHN M'DOWALL,) Respondents.  
 and JOHN WAUCHOPE, Esq. of Edmonstone,) Respondents.

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HOPE, &c.

House of Lords, 28th January 1773.

**LEASE.**—Terms of lease of coal, under which held that the tenant had right to communicate the level in the coal grounds to other adjacent collieries also let to him; but reversed in the House of Lords, and held, that by the lease the tenant had no right to do so without the consent of the landlord or proprietor.

Seams of coal run in parallel lines from north to south, beginning upon the sea shore at Prestonpans Bay, on the lands of Duddingston, belonging to the Earl of Abercorn, and continuing southward through various proprietors' lands lying higher up the country, and, after passing through the lands of Duddingston, run through Niddrie, belonging to Andrew Wauchope, the appellant; through Edmonstone, and through Woolmet, the property of Mr. Charteris.

In 1723 John Biggar took a lease of the coal on the estate of Woolmet; and in 1746 he got from the Earl of Abercorn a lease also of the coal in the Duddingston estate. The lessee having then in view the obtaining leases of the adjacent coal further up, it was provided in this latter lease, "that if either of the said parties should thereafter find it necessary to communicate the *level* of the *Duddingston coal* to the heritors of any of the neighbouring grounds, they should be at liberty so to do, but under this express condition, that the consideration to be paid by the one party to the other on that account, should be referred to the determination of arbiters, to be by them mutually named."

Biggar thereafter acquired the lease also of the coal on the lands of Niddrie from Mr. Wauchope, the appellant. In giving this lease, doubts occurred to him, whether Biggar, by his lease of the coal of *Duddingston* estate, was entitled to communicate the *Duddingston level* to the *Niddrie coal*, and accordingly, in his lease, he bound Biggar to procure Lord Abercorn's consent to the communication of that level to the *Niddrie coal*. He also bound Biggar, in case it should be found necessary and beneficial to communicate the *level* of the *Niddrie coal* to any neighbouring heritor's coal, that it should only be done with advice and consent of both parties.

ties, and not otherwise. And that whenever the level should be brought up and communicated to the coal of *Woolmet*, Biggar was not to communicate the benefit thereof to any neighbouring heritor's ground, without obtaining the appellant's previous consent.

Biggar began working the *Niddrie* coal, and the *Duddingston* level was carried into the *Niddrie* ground. After his death his heir, Andrew Wallace, continued working the coal upwards through the *Niddrie* grounds towards *Edmonstone* grounds. And after his death the respondents, Sir Archibald Hope and Captain M'Dowall, the latter being Wallace's heir, wrought the same until they were within a few fathoms of the boundary between the *Niddrie* and *Edmonstone lands*.

The communication of the level in the Duddingston lands (which were lower) to the *Niddrie* lands, necessarily allowed Biggar's successors to work the *Niddrie* coal effectually, to the depth of the sea level, by carrying off the water from these lands. It consequently followed, from carrying the level through the *Niddrie* colliery into the *Woolmet* or *Edmonstone* grounds, which were still higher, the water coming from these grounds would run down and entirely destroy and drown the *Niddrie* collieries, if *Lord Abercorn* was entitled to *shut up the level*, where it enters the lands of *Duddingston*.

The respondents, therefore, were proceeding to communicate the level of the *Niddrie* coal to *Edmonstone* and *Woolmet* grounds, without the appellant's consent, when he presented a bill of suspension, and obtained an interim interdict for stopping the further progress of the works in that direction, until the question of right was raised and determined by an action of declarator. This action was brought accordingly; and insisted, 1st, That the respondents should be decreed to procure the Earl of Abercorn's consent to the communication of the Duddingston level to the *Niddrie* coal for carrying off the water from it, pursuant to Biggar's express covenant in his lease; 2dly, That they should pay the appellant the twentieth part of the coals raised by them out of the lands of *Edmonstone* and *Woolmet*, by means of the *Niddrie* level having been communicated to those lands, or in default thereof, that the appellant should be found entitled to shut up the communication between the lands of *Niddrie* and the lands of *Woolmet*, and to keep it shut in all time coming; 3dly, That they should be prohibited from

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communicating the level to the coal of any neighbouring landowner, without the appellant's consent. To the 1st point the respondent answered, that as by the appellant's lease of the Niddrie coal to Biggar, Lord Abercorn's lease to Biggar was stated to be his title to the Duddingston level, it must have been understood by the parties, that Biggar was bound to communicate such right as he himself had from Lord Abercorn; and as it was now settled by a judgment of the House of Lords, that Biggar, under that lease, had such right from Lord Abercorn, it was only to indulge a fear, groundless and imaginary, to say, that his lordship might or could shut up the Duddingston level against the Niddry colliery. It was replied by the appellant, that the judgment of the House of Lords only found that Biggar had right from Lord Abercorn to communicate the Duddingston level to the neighbouring collieries only, so long as he had any right or interest *under the lease*; but when the *lease expired*, there was nothing to prevent the Earl from shutting up his level, and thereby drowning the Niddrie coal, and rendering its working impracticable.

The Court, upon the report of the Lord Ordinary, pronounced this interlocutor:—“Upon report of Lord Kennet,  
 • Feb. 7, 1771.  
 “ and having advised the informations for both parties, the  
 “ Lords find that John Biggar had a right, by the lease  
 “ entered into betwixt him and the pursuer, to carry his  
 “ level through the pursuer's lands, and to communicate  
 “ the same to the coal of Woolmet. And therefore find  
 “ that the said pursuer is not entitled to a recompence from  
 “ the defenders on account of the communication of the  
 “ said level to the coal of Woolmet, nor on account of its  
 “ being carried through a part of Edmonstone ground and  
 “ coal which lies interjected between Niddrie and Woolmet,  
 “ in respect the carrying it through Edmonstone coal was  
 “ essentially necessary for communicating the level with  
 “ Woolmet, which was one great view of the parties at enter-  
 “ ing into the contract. And find that the pursuer can-  
 “ not shut up the said level, but that the communication  
 “ thereof to Woolmet coal must subsist for the use of the  
 “ defenders, who derive right to Woolmet coal as heirs or  
 “ assignees of the said deceased John Biggar, so long as  
 “ they shall continue to have right and interest in the said  
 “ coal of Woolmet, and therefore assoilzies the defenders  
 “ from these conclusions of the pursuer's libel, and decern.”

Against this interlocutor the present appeal was brought to the House of Lords.

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*Pleaded for the Appellant.*—The contract of lease is clear and express, that the level shall not be communicated from the appellant's level of Niddrie to the coal of *any other heritor*, but by the mutual consent of both parties to that contract of lease. This necessarily infers, that the one could not communicate that level without the consent of the other. In the present case, the tenant, without the consent of the landlord, proposes to carry the latter's level into the Woolmet coal, not only without his consent, but also without any consideration whatever, contrary to what was expressly stipulated in the lease with the appellant. The lease expressly prohibits the communication of the Niddrie level to *any neighbouring heritor without the appellant's consent*. The proprietor of the Woolmet coal is a neighbouring heritor, and therefore the tenant having communicated the Niddrie level to the Woolmet, without the appellant's consent, and without any consideration, the latter is entitled to shut it up.

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*Pleaded for the Respondents.*—The words of the lease, as well as the spirit and intendment of the transaction, go to establish, that the agreement in the lease, was a partnership or joint property concern in the level in question, to be mutually communicated, without a demand from the one on the other, except what was expressly stipulated in the lease. On any other footing than this, the bargain would have been a most unequal one to Mr. Biggar, because he would have had all the expense of the undertaking, while the only benefit, was *that* which might arise from the communication of the level to Woolmet. Besides, if any consideration had been stipulated for the communication of the Niddrie level to the coal of Woolmet, it would have been expressly stipulated in the lease. In this lease, every obligation covenanted and prestable is set forth and specified. There is nothing stipulated about the sum to be paid, as consideration for the communication of the said level, while it is clear such a communication was obviously in the view of the parties, and it is therefore reasonable to presume that none such was agreed on, and none such demandable. At the time of the lease, the Woolmet coal was already in the possession of Biggar, as lessee, and had been worked for many years. It was therefore a part of the transaction with the appellant, and the clear understanding of parties, that the Niddrie level should

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come under the power of Mr. Biggar; and that the consent of the appellant was only requisite, when that level was carried into any neighbouring grounds, other than, or beyond Woolmet.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is hereby reversed. And it is hereby declared that John Biggar had no right, by the lease entered into between him and the appellant, to communicate the level carried through the appellant's lands, to the lands of Edmonstone or Woolmet, without the appellant's consent first had and obtained. And it is further ordered, that the cause be remitted to the Court of Session, to do thereupon what shall be agreeable to law and justice.

For the Appellant, *Ja. Montgomery, Al. Forrester,*  
*John Ord.*

For the Respondents, *Al. Wedderburn, Henry Dundas.*

Not reported in Court of Session.

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MARGARET and ELIZABETH DUNCAN, - *Appellants;*  
 FRANCIS FOWKE, - - - - *Respondent.*

House of Lords, 5th February 1773.

VESTING OF LEGACIES.—Circumstances in which legacies held to vest.

For full report of this case, see Morison, 8092.

The circumstances were these. A testator, by his will, bequeathed one half of his personal estate to his two nephews, declaring that his will was to take place at the death of his wife, and that until that event she was to have the liferent interest thereof. The nephews survived the testator, but died before the death of the liferenter. The Court of Session held that the legacies vested in the nephews. And, on appeal to the House of Lords, this judgment was "affirmed."

For Appellants, *J. Montgomery, Alex. Lockhart, J. Mac-  
 laurin, Tho. Lockhart.*

For respondent, *Al. Wedderburn, John Madocks.*

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(M. 16,365.)

CAPTAIN DAVID PARKHILL of Craiglockhart,  
 Eldest Son and Heir of JOHN PARKHILL } Appellant;  
 of Craiglockhart, - - - - - }  
 ROBERT CHALMERS of Lambert, for himself,  
 and as representing the deceased ALEX- } Respondent.  
 ANDER CHALMERS, sometime Accomptant  
 of Excise, - - - - - }

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PARKHILL  
 v.  
 CHALMERS.

House of Lords, 12th February, 1773.

**TUTORY—INVENTORY—DISCHARGE.**—1. Held, in consequence of a tutor neglecting to give up in his inventory, a lease of dues current at the deceased's death, that he was liable in payment of interest of these, from the dates at which they were respectively paid, and this, notwithstanding a discharge being granted for £889, as the sum affeiring to the minor's interest therein, in full satisfaction of all claims on that account, the minor having been kept ignorant of the claim and the state of the account. 2. Held, for the same reasons, that the curator was not entitled to charge any commission for his trouble. 3. Held that the curator, who had himself been a partner along with the deceased in the said lease current at the death, was not bound, on expiry of the same, to take a renewal also in the pupil's name; but entitled to procure that renewal in his own individual name—the pupil having then attained full age, and the curatory expired.

The appellant's and respondent's fathers, John Parkhill May 1750. and Alexander Chalmers, were in partnership together, viz. in a lease from Lord Erskine of the coal of Alloa;—a lease from the Magistrates and Town Council of Edinburgh of the shore dues of Leith;—and a lease of the duties of the lights of the Isle of May.

The present question arose out of the latter lease, which had been renewed to the parties, for the third time, at Whitsunday 1749, for eleven years, at the same rent as formerly, of £150 per annum. During the currency of this lease, and a year after the commencement thereof, John Parkhill died, leaving a settlement, appointing his partner, Alexander Chalmers, along with others, *tutors* and *curators* for his only surviving children, the appellant and his brother, who were then both infants.

The *tutors* and *curators* thus appointed, accepted of the office; and Alexander Chalmers, having been so nearly con-

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nected with the deceased in business, was appointed, or allowed by the other tutors, to take the sole management of their affairs. In this capacity, he uplifted the whole profits arising from the lease of the May Light house duties, his own share thereof, as well as the share belonging to the appellant, until the termination of the lease at Whitsunday 1760. In the course of this management, he neither accounted to his co-tutors nor to the appellant, for the sum of profits effering to his share therein, which, in the meantime, had accumulated to upwards of £1000. Nor did he include it in the *tutorial inventories* given up by him. It was also alleged that he kept the whole interest in this lease a secret from his co-tutors, his object being, that when the lease expired, he might secure a renewal for himself. In the year 1759, before the expiry of the copartnery lease, accordingly, he obtained a lease of the Isle of May dues for himself, to commence at Whitsunday 1760, when the copartnery lease expired. In the course of this year Alexander Chalmers died.

Sometime thereafter, his son Robert Chalmers, the respondent, called on the appellant, and stated, that from his father's books he found that at the time of his death he was owing him £889. 11s., as the proceeds of the Isle of May Light dues. This, the appellant alleged, was the first time he had heard of the claim. He was then of age, and was paid the amount; and he granted a receipt, without seeing any curatorial accounts. But sometime afterwards, the parties met in Edinburgh, when a settlement of the tutorial accounts was expected, and when the appellant was induced to grant a discharge, on the respondent's representation that the curators might object to the nature of the receipt formerly taken. This discharge acknowledged full payment and satisfaction of his father's share of the joint lease in question, referring to a particular account, which did not comprehend the Isle of May dues. There was superadded a general discharge, discharging all their intromissions with his estate and effects. He was immediately thereafter called away on foreign service; and it was not for seven years that, on his return to Scotland, he procured possession of his father's books, and saw for the first time that his father had an interest in the lease, and that a greater sum was due him than was paid. Accordingly, in these circumstances, the present action of reduction, declarator, count and reckoning, was raised, 1st, To reduce the two discharges above referred to, and to have the defender to render and pay a fair account of his intromissions with the Isle of May dues, for the lease

current previous to 1760. And, 2d, To have it declared, that the appellant was entitled to an equal share and interest in the *renewed lease*, taken by Alexander Chalmers in his own name, after the copartnery lease expired in 1760; and to have an accounting for the profits of the same. Defence,— The two discharges utterly foreclose the present action. This plea was afterwards abandoned; and the points discussed were, 1st, An article of 12 per cent, for which Alexander Chalmers had taken credit in his account of the dues in his own books, as commission or agency; 2d, The interest of the sums in his hands; and, 3d, His claim for a joint share and interest in the *renewed lease* and profits thereof.

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Of this date, the Lord Ordinary pronounced this interlo- June 29, 1769.  
cutor: "Finds that the not mentioning the tacks of the  
"duties of the Isle of May Lights, of the shore dues of  
"Leith, and of the duty of the great coal of Alloa, (in all  
"which the pursuer's father, John Parkhill, was a partner,)  
"in the tutorial inventories, although not appearing to have  
"proceeded from any bad intention against the pursuer, or  
"his brother, the pupils, as the deceased John Parkhill's  
"being concerned in these tacks was notour, and as Alex-  
"ander Chalmers, the defender's father, who was himself a  
"partner in these tacks, kept a most accurate account of the  
"profits on these tacks, distinguishing in his books the share  
"which fell to Mr. Parkhill's representatives, which could only  
"be with a view to account fairly for the same, but which he  
"was prevented from by death, yet whatever was the cause  
"of the neglect, which probably Mr. Chalmers, had he been  
"alive, might have explained, the pursuer is entitled to the  
"legal consequences of this neglect; and particularly, as there-  
"by the pursuer remained ignorant of the claim, so cannot be  
"allowed to suffer for not demanding regular payment of  
"the said profits, as from time to time they came into Mr.  
"Chalmers' hands, therefore Alexander Chalmers was, and  
"now the defender, as representing him, is bound to pay  
"interest for the said profits, from and after the first term  
"after they came into his hands, until the said profits were  
"paid up; and that from the term preceding John Park-  
"hill's death, the pursuer has right to these profits, so far  
"as not cleared with John Parkhill himself, notwithstanding  
"of the discharge by the pursuer's brother of part of  
"these profits, as supposed executry, when yet they be-  
"longed to the pursuer, the heir, reserving to the said de-  
"fender, Robert Chalmers, action for recourse against the

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" pursuer's brother. But finds, that notwithstanding these  
 " tacks were current at John Parkhill's death, neither the  
 " defenders, the tutors as a body, nor Alexander Chalmers,  
 " one of their number who had been partner with John  
 " Parkhill in them, were bound, upon the expiry of the old  
 " tacks, to procure new tacks in like copartnery with this  
 " pursuer, then very young, and thereafter a military man;  
 " the pursuer's interest in these tacks having ceased upon  
 " their expiry. And further, finds the defender Mr. Chalmers,  
 " not entitled to charge any sum for commission to himself  
 " or his father, on account of the trouble they were put to  
 " in levying the pursuer's share of the profits, the same  
 " being forfeited on account of neglecting inventories, as  
 " the law directs."

This interlocutor was acquiesced in by the respondent, so far as related to the  $12\frac{1}{2}$  per cent. stated for his father's trouble, whereby the appellant recovered £900. But the appellant preferred a representation against that part of the interlocutor, which found him not entitled to a communication of the profits of the lease acquired in Alexander Chalmers' own name, of the Isle of May dues, after the expiry of the copartnery lease, which was current at his father's death.

The case was then taken to the Court, on report by the Lord Ordinary (Auchinleck) upon proof and memorials on this point. Upon advising which, this interlocutor was pronounced, " Find the defender not bound to communicate to  
 " the pursuer any share of the benefit arising on the lease  
 " of the May Light duties let to Alexander Chalmers, the  
 " defender's father, by Mr. Scott of Scotstarvet, in Novem-  
 " ber 1759, to commence at Whitsunday 1760; and remit to  
 " the Lord Ordinary to proceed accordingly."

The appellant thereafter insisted for expenses, on the ground that he had been successful in a great part of the cause, whereupon the Lord Ordinary, in respect that the defender was not, " in any part of the proceedings, either litigious or tergiversing, and that he has prevailed in a very great point of the cause, and paid up the sums which were found due directly, found no expenses due." And, upon reclaiming petition, the Court adhered.

Against these three interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The office of a guardian is a most sacred and important trust, and it has been the wisdom

and policy of the law, to tie up the hands of tutors and curators in regard to the estates of infants committed to their care, in such a way that no possible temptation of advantage to themselves should exist. In this case, the guardian has, availing himself of the office he held, substituted himself in place of his pupil, and has acquired a valuable interest to himself, which by law ought to have been acquired for his ward. His office indispensably required him to abstain from doing any positive injury to his pupil's rights, but enjoined him to manage them precisely in the same manner as a prudent man would do his own affairs. He was bound, therefore, whenever an opportunity occurred, to do every thing to promote his pupil's interest. Whatever, therefore, is done or transacted, which naturally arises out of the pupil's affairs, and in the course of their administration, is presumed in law to be done for the advantage of the pupil. This was the rule laid down in the Roman law, and is consonant with those principles which regulate the law of Scotland : Stair, b. i. tit. 6, § 17, establishes the rule that "Tutors or their factors, are presumed to do that for the behoof of their pupil, which they ought to do; and though it be done *proprio nomine*, it accrues to the pupil. This is presumed *præsumptione juris et de jure*, so that the narrative bearing another cause is not respected." Bankton, b. i. tit. 7, § 59, "Whatever rights the tutor or his factor acquires, relative to the pupil, the law presumes it to be done for the pupil's behoof, and therefore, they accrue to the pupil, upon the same terms they were acquired." And this doctrine is supported by various decisions. The new lease of the Isle of May dues, having been obtained by Alexander Chalmers alone, as acting tutor for the appellant, must fall within the rule of law so laid down; as it was clear, from the whole circumstances of concealment, that the advantage thus unduly obtained by him has been to the prejudice of the appellant, and therefore he ought to have redress thereagainst. Nor is it any answer to this, to say, that at the time Alexander Chalmers obtained the renewal of this lease, the appellant was past majority, of full age, and, consequently, the office of curatory at an end, because, although this was the fact, yet the obligation and responsibilities still attached, for these continue beyond the legal time, and subsist until the tutors have strictly accounted, and are exonerated.

In regard to expenses, no party complaining has a better

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right, in the whole circumstances of the case, especially when the appellant's success, and the fraudulent concealment of large claims, are taken into view.

*Pleaded for the Respondent.*—The respondent does not dispute the principle of law referred to, in regard to the acquisitions of curators; but denies its application to the present case. The new lease, in which the appellant claims an interest, was not entered into until several years after the appellant was of age, and no longer a minor. He had therefore no interest, as that interest was at an end with the expiry of the former lease, current at his father's death. After this event, and after he had attained majority, the respondent had no authority to act for the appellant, nor was he bound in law to act for him in regard to the lease in question. The whole transaction, in so far as the respondent's father was concerned, was fair, and to be expected in the circumstances. The appellant was a man devoted to the military life. He was actually on foreign service. And the respondent's father could not form the remotest idea that he could possibly have a wish to join in commercial affairs. Nor is it likely that he would have got his father to join him in such a project, far less likely that the landlord would let these duties to a young officer in the army. Nor has there been any concealment proved, such as to shew a fraudulent intention on the part of the respondent's father. The omission of all the joint leases or adventures, from the tutorial inventory, was not evidence of such fraudulent intention; as this was deemed proper by the whole curators, because, at that time, it was not certain whether these would be attended with profit or loss. For the same reason, or by an error of the clerk, notice is not taken of these in the Sederunt book. These omissions were part of a plan, upon which the tutors exercised their judgment for the best. Besides, all claim is now cut off by the discharges, as well as long acquiescence; and it is no objection to this, to say, that a general discharge, subjoined to a list of particulars discharged, will not be construed to extend to matters of a quite different nature, which are not presumed to have been under the view of parties; because this rule holds differently in regard to particulars of the very same kind with those that are discharged, and more especially where the discharge is of the acts and deeds of a tutor.

After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and

that the interlocutors therein complained of be, and  
the same are hereby affirmed.

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For Appellant, *E. Thurlow, Tho. Lockhart.*

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For Respondent, *Ja. Montgomery, Al. Wedderburn, Ilay COULTER, &c.*  
*Campbell.*

(M. 7106.)

ROBERT M'NAIR, Merchant in Glasgow, *Appellant.*

JAMES COULTER and Others, Merchants in Glasgow, Insurers of the Ship Jean and her Cargo, - - - } *Respondents.*

House of Lords, 15th February 1773.

**VALUED OR OPEN POLICY—PROOF—BILL OF LADING—INTEREST.—**

Insurance for £1000, on ship and cargo, lost on her voyage from Virginia to Barbadoes. The son of the insured was master. The policy proceeded on false information of the value sent by the son to the insured, but without the latter's knowledge. The Court of Session held, that the bill of lading was not good evidence of the value and quantities of goods. The question was, Whether he was entitled to recover the sum named in the policy, or the real value of the ship and cargo only. Held, reversing the judgment of the Court of Session, that he was entitled to recover the sum of £1000 named in the policy; also to recover interest thereon.

This question arose out of a policy of insurance effected on the ship Jean and her cargo, for the voyage from Virginia to the Barbadoes, in which the respondents were the insurers, the appellant the party having the insured interest.

The particulars of the case are fully detailed in a report of the case, which went to the House of Lords (Vide *ante*, p. 224.) The case was then remitted back to the Court of Session to dispose of the other points in the cause.

By interlocutors of 8th February and 21st June 1765, the Court found that the insurers were not bound to pay the sums at which the ship and cargo were insured, but only the real value, as the same might be ascertained, and finding the value of the ship to be £450. When the case came back from the House of Lords further discussion took place, on the point, whether it was an open or a valued policy?

Of this date, the Court pronounced this interlocutor : Feb. 13, 1772.  
 " Find that the charger (appellant) is not entitled to recover from the suspenders (respondents) the £1000 Sterling specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship Jean and her

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**M'NAIR v. COULTER, &c.** " cargo : Find, That in this circumstantiate cause, the bill  
 " of lading and invoice, which last is only signed by James  
 " M'Nair, cannot be admitted as good evidence, neither of  
 " the quantities nor value of the goods which were put on  
 " board said ship in Virginia : But find, That the quantities  
 " must be held to be as ascertained by the manifest of the  
 " naval officer, and the values ascertained by the oath of  
 " John Hood, by whom the goods were mostly furnished :  
 " Find the suspenders (respondents) are also liable to make  
 " good the value of the ship as formerly ascertained, ex-  
 " pense of shipping the goods, and the freight thereof from  
 " Virginia to Barbadoes, and likewise the sums paid for the  
 " insurance : But find, That out of the sums aforesaid, the  
 " suspenders (respondents) are entitled to have deduction  
 " of £2 per cent., in terms of the policy, as also to have de-  
 " duction of the value of the goods aboard the Jean which  
 " belonged to Mr. Smith, to the extent of £100 Sterling ;  
 " and, in the last place, find the suspenders (respondents)  
 " liable for interest of the balance, after deducting as above,  
 " from the date of the decree of the Admiral Court, and  
 " remit to the Lord Ordinary to proceed accordingly."

Against this interlocutor the present appeal was brought, and a cross-appeal brought, in so far as the interlocutor found the respondents liable for the value of the ship and cargo, with *interest*.

*Pleaded for the Appellant.*—That this is a valued policy of both ship and cargo, and under such a policy the insured was entitled to recover the whole sum (£1000) in the policy. A valued policy is one wherein the ship and cargo are valued at a particular sum, without any further account to be given, and upon such a policy, where the interest insured is admitted to have existed, so as to take it out of the meaning of the statute 19 Geo. II., the rule is, to take the quantum of that interest from the value expressed in the policy, without any other proof of the quantities and values of the goods. He is further entitled to insure a sum larger than the value of the cargo, to protect him from loss. This the appellant maintains as a general principle of law. But even if he were wrong in this, and any further proof of value than the policy affords were necessary, it is clear that the value of the ship, as ascertained by the interlocutors of 8th February and 21st June 1765, cannot be held to be her true value at the time she was lost ; because, although James M'Nair paid £450 for her, it is proved at this time she required very considerable repairs, which cost £150. And in regard to the cargo, the kinds and quantities are fully proved by the bill of lad-

ing, and other proofs, in support of it. It was, therefore, wrong in the Court below to hold that this bill of lading was not good evidence of the quantity of goods on board, and of the value thereof. And in regard to the cross-appeal; if *COULTER, &c.* the appellant be entitled to recover every part of the sum under the policy, he is then clearly entitled to interest during the time the sum has been withheld. Here there was *mora* in making payment; and in all such cases interest is due in name of damages for that *mora*, and therefore the interest has been properly awarded from the commencement of the suit.

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*Pleaded for the Respondent.*—1st. The policy in question cannot, by the law of Scotland, be considered a valued policy, which obliges the underwriters to pay the whole sum of £1000 mentioned in the policy; but only a policy, the claim under which is for the value of the ship and cargo insured, as the same might be ascertained. This latter rule of adjusting the claim between the insurer and insured, has been long recognized in Scotland, and is agreeable to the spirit and meaning of 19 Geo. II., as it effectually discourages the pernicious practice of effecting insurances for more interest than the insured has in the subject insured. In any view, the insurers are entitled to deduction of £23. 7s. as salvage for that part of the wreck saved, and also to 2 per cent. the deduction mentioned in the policy in case of loss. 2d. In regard to the cross-appeal, a policy of insurance is not a contract which carries interest for any sum which the underwriters may become liable to on account of a loss; they engage only to be liable for the loss itself, not for any interest for or upon such loss, as the policy cannot be placed on the same category with a bond, bill, or other security, which, upon the face of them, or by law, carry interest; and there has never been any instance in the courts of Westminster where such interest has been allowed on a contested policy.

After hearing counsel this day upon the original appeal, complaining of *certain parts* of three interlocutors of the Lords of Session in Scotland of the 8th February 1765, the 21st June 1765, and the 18th of February 1772, it is

Ordered and adjudged that the interlocutors of 8th February and 21st of June 1765, in so far as they found the policy of insurance does not, in this case, oblige the insurers to pay the sum at which the ship and cargo were insured; and also the interlocutor of the 13th February 1772, in so far as it finds the appellant is not entitled to recover from the respondents the one thou-

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sand pounds sterling specified in the policy, but only a sum equal to the damage he sustained by the loss of the ship and her cargo, be, and the same are hereby reversed : And it is hereby declared, that the appellant is entitled to recover from the respondents the sums by them severally underwritten, and interest thereof from the date of the decree of the Admiralty Court, and of the sum of £83. 1s. as the expenses of extracting the decree in the said court, under discount of 2 per cent., in terms of the policy, and of £23. 7s. as the acknowledged value of what was recovered from the wreck, and dismisses the cross-appeal.

For Appellant, *Ja. Montgomery, Al. Wedderburn.*

For Respondents, *J. Dunning, Fl. Norton.*

ROBERT ALEXANDER, Esq.	-	<i>Appellant;</i>
JAMES MONTGOMERY & Co.	-	<i>Respondents.</i>

House of Lords, 19th February 1773.

**SALE—LOCUS PENITENTIA.**—Circumstances in which written correspondence, in regard to a sale of coal, was not held to amount to a final and conclusive agreement, the parties having stipulated that their agreement was to be a *written* agreement, and, until this was executed, either might resile ; affirming the judgment of the Court of Session.

A proposal was entered into for the sale of coal, on the appellant's part, to the respondents on the other ; and the question was, Whether the following letters, which passed from the one to the other, imported a definite and final agreement on the subject of the sale ?

The respondents were possessors of the Newton colliery in Ayr : and Mr. Alexander addressed the following letter to Dr. Campbell, one of the partners of that company. "Sir,—My friend, Mr. M'Adam, acquaints me, he had talked over a proposal which I had desired him to make to you and partners of the Newton coal work, for the delivery of a quantity of coals at the harbour from my brother's estate yearly. Mr. M'Adam informs me that your company agree to take 25,000 tons yearly, and to pay for the same, on delivery, 5s. per ton, the agreement to commence Martinmas next. Mr. M'Adam says nothing of the endurance of the agreement, but my agreement was to agree for 21 years. It being understood that, should the coal work cease for want of coal, or other unavoidable

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" obstructions, the agreement shall cease, but otherwise,  
" you shall have *all the coals taken out* to the extent you  
" agree for, and for any quantity short taken out, we shall  
" pay you a penalty equal to what we suppose your profits MONTGOMERY,  
" may be, suppose 6d. per ton; and this I now confirm.  
" I dare say, as our interests are by this agreeement the same, Mar. 17, 1770.  
" you will have no difficulty in allowing a waggon to pass  
" through your grounds, on paying damages.—Mr. Beaumont,  
" who is to work the coal for my brother, will doubtless call  
" on you, and as he is a very skilful and judicious man. I  
" doubt not but he may be of use even to your works, and  
" that, in all events, you will go on together harmoniously.  
" He brings most of our colliers from England. I think a  
" missive letter as binding as any other. *But as the agree-*  
" *ment is for a long time, it may be convenient to have a deed*  
" *on stamped paper. If you will send me a scroll, I shall re-*  
" *turn it with my observations, or extend and sign it if right.*"

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The answer to this letter was as follows:—“ Having  
“ been some days from home, I did not get your letter till  
“ just now, else I should have answered it in course. I did  
“ agree with Mr. M'Adam, as he wrote you, to give you 5s.  
“ per ton for your coal, delivered on the quay, and to take  
“ 25,000 tons the first year, and 30,000 tons every after year,  
“ but no more, as I was apprehensive that quantity, with  
“ what may be expected from the other coal pits, would be  
“ as much as could possibly, in the present state of our (Ayr)  
“ harbour, be shipped in 12 months, and more than can be  
“ shipped at the present wharf; but, as we have an exclusive  
“ privilege of erecting wharfs on the other side during the  
“ course of our lease, we can in some measure obviate that  
“ difficulty. I told Craigengillan, (meaning Mr. M'Adam),  
“ if our harbour came to be improved, so as to contain more  
“ shipping, I should have no difficulty in extending the ex-  
“ port of your coal, as there is no present appearance of  
“ the markets falling for commodities; we did not agree  
“ as to time. I did not know how much of our Newton tack  
“ was to run, and he was not very sure how long you might  
“ like to engage. *But I must now inform you, that we do not*  
“ *incline to take it longer than till the end of our Newton tack*  
“ *of which there is to run 16 years, after Martinmas next.*  
“ As to the bargain being void, upon the coal becoming un-  
“ workable, it is reasonable and agreed to; as to 6d. a ton  
“ for what you may fall short while it is wrought, it is more  
“ than we get by it; and therefore cannot be objected to.—  
“ As to the waggon way, I canot speak to that point; I am

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**ALEXANDER** " afraid we have it not in our power, without the consent of  
**v.** " the proprietors, to grant it ; neither do I know (as I have  
**MONTGOMERY,** " not seen any of them) how far it may be agreeable to the  
**&c.** " other gentlemen concerned, if we should get the consent  
" of the community of Newton ; but this I will venture to  
" say, that there is nothing Mr. Alexander ought to ask, or  
" we to grant, that will be refused, as I am sure we will  
" most heartily wish to see a thing of such general concern  
" fairly on foot. *When I have your answer to this, I shall*  
" *cause scroll the contract, and send it you.*"

Mar. 19, 1770. To this letter, Mr. Alexander returned the following answer :—“ I have your favour of the 17th confirming, on behalf of the *Newton Company*, the verbal agreement made with Mr. M‘Adam about my brother’s coal ; by the said letter, I see you propose to take about 30,000 tons of coals annually, after the first year, which, accordingly, I engage for him to deliver to the company, the agreement to last for 16 years from Martinmas next, the penalty 6d. per ton. I apprehend our mutual missives sufficiently explicit and binding ; and the only use of a formal contract is, in case any of the letters being lost, or to enforce summary execution. *When you send me the scroll, I shall examine and return it with my observations. In regard to a waggon-way, every motive of mutual interest, exclusive of the public benefit, will certainly induce you to promote a waggon-way, which may carry both coals ; and we send next week a gentleman well conversant in these matters, with full power to transact this ; and to prepare for opening the coal. His name is Mr. John Beaumont. He will be very ready to give his best advice and assistance, which may be worth attending to ; you need say nothing to him of the agreement.*”

As in these letters reference is made to the alleged agreement entered into in regard to the sale of the coal, the following letter from Mr. Alexander then followed :—“ Sir,— As you are so good to offer to make enquiry about the sale of coals, and to see if any of the Air gentlemen would engage and buy my brother’s, deliverable at the ship’s side in Air, or on the coal hill, I beg leave to acquaint you that, having taken all possible information concerning the coal, we have reason to think it valuable ; and as the offers hitherto made are noways adequate, my brother thinks of working it himself, at least till such time as the value of it is better understood. We have in view a man of skill and abilities, who would work it for my brother’s account ;

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" but, unless the sale could be extended to at least 25 or  
" 30,000 tons, we could not offer him such an appointment  
" as would be necessary to engage him; we find the coals  
" could be delivered on board ship for 5s. per ton good  
" weight, or 4s. 6d. on the hill; and as we live at such a  
" distance, and charges must attend the receiving the money,  
" and making it a staple trade, if men of character could  
" be found who would take the coals as they are turned out,  
" which shall be in a good merchantable condition, the  
" quantity annually as above to be increased in the option  
" of the buyer, not to exceed 60,000 tons, my brother would  
" enter into a contract, to commence Martinmas next; and  
" as the contractor would be put to no advance, and the  
" present export price is 6s. per ton, or 5s. per ton on the  
" hill, supposing export sale could be pushed at 5s. 8d., the  
" difference would be a handsome allowance to the con-  
" tractor. I beg to hear from you soon on this subject, as  
" we must decide on something immediately."

No written or stamped agreement followed; but a scroll was made out, and sent by the one to the other, and in the correspondence that attended the alterations thereon, and the terms thereof, the parties finally disagreed.

In the meantime, it was alleged by the appellant, that on the faith of the preliminary agreement, they made a contract with a man of skill, who had proceeded to take measures for opening and working the coal in question. And, conceiving that by the letters above quoted, there was a conclusive binding agreement, the appellant raised action for implement thereof.

The Lord Ordinary, of this date, pronounced this interlocutor, " Having considered the letters of correspondence exhibited by both parties, finds, in the treaty for entering into a contract between the parties, several of the material and essential articles were not adjusted and agreed upon, and that no finished bargain was concluded so as to be binding upon the parties, but that either of them may resile from their proposal; therefore dismisses this action, and assuzies the defenders, and decerns." June 26, 1771.

On petition, the Court altered, and held that there was a concluded bargain, and that the parties were not entitled to resile. But, on a second reclaiming petition, the Court found—" That no finished bargain was concluded so as to Mar. 6, 1772. be binding upon the parties, but either of them may resile. Therefore assuzie the defenders and decern."

Against this interlocutor of the Court, and that pronounced

1773. by the Lord Ordinary of the 26th June 1771, the present appeal was brought.

**ALEXANDER**  
".  
**MONTGOMERY**,  
&c.

*Pleaded for the Appellant.*—The question upon the present appeal is, Whether such an agreement is made out by the letters which passed between the parties, supported by acquiescence, as establishes a concluded bargain? The requisites essential in a contract of sale, are, consent of the parties, *certainty* in the *thing* sold, and the *price* paid. In the present case, all these three requisites are present; and if that be fixed, it can afford no solid objection to the efficacy of the contract, that the parties disagree about the *mode* or *manner* of carrying the contract into execution. Hence, in the transaction, there are *termini habiles* to constitute a binding bargain; and, as obligations in respect to land rights may be constituted by letters, *a fortiori* in mercantile transactions, the case must be the same. The want of obligatory words in this correspondence, is no good objection, because Mr. Alexander had engaged to deliver 25 or 30,000 tons per annum; and no *verba solemnia* are necessary to constitute a bargain by letters. The price was fixed at 5*s*. per ton, to be delivered at the quay of Ayr. The agreement was to endure for 16 years. And it was no objection to this to say, that the parties had agreed, that the articles were afterwards to be reduced into a formal contract, and therefore, that until such contract was prepared and executed, the bargain was incomplete, and the parties entitled to resile; because, although this rule of law was undoubted, yet where, from the tenor of the letters themselves, which clearly shewed that both parties understood themselves bound by these letters, and only bound themselves to enter into a more formal contract for the purpose of summary execution, it was clear that this rule of law did not apply to the circumstances of this case. Nor does it signify that the person who wrote these letters had no power, his brother, the appellant, being the proprietor, and the only party entitled to treat; because the appellant's brother, who wrote these letters while the appellant was on the Continent, had full power, and was authorized to enter into such a contract; and Mr. Campbell was a copartner of the company.

*Pleaded for the Respondents.*—Both parties, from the beginning of this correspondence, had a contract in contemplation, which appears from the letters themselves. Mr. Alexander even first proposed it, and accordingly a scroll of the contract was written out. This was agreed to; and it was upon descending to particulars in this scroll, that the parties disagreed. A contract, therefore, having been agreed upon,

the rule of law which gives *locus penitentiae* to either party, 1773.  
 applies with its utmost force to this case, where that contract  
 was never followed up. Whatever might be the form of <sup>MAGISTRATES  
OF</sup>  
 agreement necessary in such a case was immaterial, so as <sup>RUTHERGLEN</sup>  
 this was fixed, that the parties having agreed to a particular  
 mode of contract on stamped paper, could not depart from  
 that mode, and, until this was completed, there was *locus*  
*penitentiae*. But, independently of this, the letters do not  
 contain a final agreement. They were indefinite in a great  
 many essential and important points, in such a transaction.  
 Nothing was fixed about preventing the appellant from after-  
 wards opening other coal works, and bringing them into  
 Ayr, and so competing with him. Nor was the penalty pro-  
 perly fixed. Nor was it stated whether the ton was to be  
 measured at Ayr, or to be weighed, as is customary, in Ireland.  
 Nor was the time of delivery of the coal fixed, or any thing  
 specified, whether it was to be delivered daily or weekly, as  
 it should be dug out of the mine. As the parties differed  
 about these things, the presumption is, that no concluded  
 bargain was entered into by the letters, and it does not affect  
 the question in the least, that the appellant has been so rash,  
 as in the face of these differences, to open the ground in  
 question.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors therein complained of be, and the  
 same are hereby affirmed.

For the Appellants, *E. Thurlow, Ja. Montgomery.*

For the Respondents, *Al. Wedderburn, Ar. Macdonald.*

*Note.*—Not reported in Court of Session. The judges in House of  
 Lords seem to have been as much divided in this case as the judges  
 in the Court of Session. After the debate, the votes of the Lords  
 were equal—four for reversing, and four for affirming, whereupon  
 it was determined that the interlocutor should not be reversed. It  
 would seem from this, that the lay lords joined in the voting.

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The MAGISTRATES and TOWN COUNCIL of the } *Appellants* ;  
 Burgh of Rutherglen, - - - - - }  
 JAMES CULLEN, Wright at Whitehills, JAMES }  
 WEIR of Hill, and SAMUEL STEIL of Town- } *Respondents*.  
 head, - - - - - - - - - }

House of Lords, 12th March 1773.

CONTRACT—ERROR IN ESSENTIALS.—A contract specified for the  
 building of a bridge from Rutherglen across the river Clyde, and

1773.

MAGISTRATES  
OF  
RUTHERGLEN.  
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enumerated the height of abutments, and dimensions otherwise, and referred to a plan. But omitted to mention any thing about the depth of the foundation below the bed of the river, which, from the nature of the bed, turned out to require a considerable depth of foundation, strongly piled. Held, that there was no binding contract on the builder to build, this having been omitted, and that he was free. Also held, as to the abutments built on the level of the bed of the river, that he was entitled to take away the materials so erected and built—he repaying to his employer the partial payments made towards the contract price.

The appellants, as Magistrates and Town Council of the burgh of Rutherglen, having employed James Cullen, a mason builder, to build a bridge across the river Clyde, opposite to the burgh of Rutherglen, a regular contract was entered into, whereby James Cullen was taken bound to build a bridge of 380 feet in length, 20 feet in breadth, (18 feet within the parapets) *conform to a plan* thereof, marked and signed on the back, to be laid with chingle (gravel) 18 inches deep, and to contain 5 bows or arches, whereof the middle bow of 70 feet wide, the two bows next thereto, each thereof 65 feet wide, and the southmost and northmost bows, each 60 feet wide; the walls within the arches 4 feet thick, the pillars and ledging all of ashler work, the stones one foot broad in the bed, and head stones two feet in length; the pend stones of the 70 feet arch, three feet; the wall without the land breast, *i. e.* abutments, three feet thick, and the ledges  $3\frac{1}{2}$  feet in height.

A plan of the intended bridge was signed by the parties, as relative to the contract. In the elevations exhibited by this plan, all the pillars and abutments are represented as having their tops and bases upon the same level of masonry or hewn work, rising 15 feet in height, but neither here nor in the contract, was any thing stated about the depth of the foundation below the bed of the river, or whether any wooden stakes were to be driven in below that foundation, both of which were essential to the contract, and the sufficiency of the bridge.

The respondent not having proceeded to build the bridge, by sinking such a foundation, the appellants, conceiving that he was not only not working the work in a sufficient manner, but also deviating from the contract and plan, in so far as laying the foundation of the abutments was concerned, protested, and thereafter charged him to perform his contract.

After various proceedings before the Lord Ordinary, who remitted to men of skill to report; and particularly to Mr.

Dec, 19, 1771. Laurie; and a fresh action being raised, with which the pre-

sent was conjoined, the Lord Ordinary ordered the respondent to amend and repair the north pillar, and to take down and *found* anew two abutments insufficiently founded, all to be done in the manner pointed out by Mr. Laurie.

1773.

MAGISTRATES  
OF  
RUTBERGLEN  
v.  
CULLEN, &c.  
Feb. 12, 1772.

On reclaiming petition, the Court altered this interlocutor, and found, 1st, "That the bridge in question, must be executed not only according to the contract, but according to the plan to which the contract refers, and which is agreed by both parties, in so far as there is no contradiction betwixt the two, which there is not with respect to the foundations of the abutments and pillars, concerning which the dispute principally is; but finds that James Cullen, the undertaker, is not bound to do any thing not contained either in the contract or plan. 2d, That it is proven, not only by the report of Alexander Laurie, a person named by the Lord Ordinary, and wholly unconnected with either party; but also by the report of other men of skill, formerly appointed to inspect the work, so far as it has proceeded hitherto, is insufficient and disconform to the contract and plan. 3d, That it is improper to allow a proof at large in this case, where the question is not concerning a matter of fact, but a matter of art, of which artists are the only judges, more especially as it appears from the former proceedings in the cause, that when such proof was proposed by the Town, it was opposed by James Cullen. Therefore refuses the desire of the representation, and adheres to the former interlocutor, approving of Laurie's report."

Against this interlocutor a reclaiming petition was presented, whereupon the Court pronounced this interlocutor, Nov. 26, 1772. altering their former judgment, finding, "in respect it appears from Mr. Laurie's report, that if the bridge be executed conform to the contract and plan, it will not be a sufficient one; and that it appears that neither party, when they entered into the contract, had it in their view that it would be necessary to sink the foundation of the bridge considerably under the bed of the river, and to pile with wood below the foundation, which now appears must be done, in order to make a sufficient bridge. Therefore, find that neither party are bound by the contract, and suspend letters, and assoilzie the defenders from the conclusions of the declarator for completing the bridge: but, as the pursuers have advanced to the defender the sum of £633. 6s. 8d. sterling, and that the work, so far as executed by the defendant, is neither conform to the contract and plan, nor

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" such as can be of use for a sufficient bridge ; find that the " defender and his cautioners are liable, conjunctly and " severally, to repay that sum to the pursuers, and interest " thereof from the 18th day of May 1770, when the same was " advanced ; and find the petitioner entitled against the 1st " day of July next, to carry off and dispose of the whole ma- " terials, either already made use of by him, or prepared and " brought forward for building the bridge, unless betwixt " and that time the pursuers shall agree to take the materials " not used off his hands, or to make use of the work already " wrought ; and in that case, remit to the Lord Ordinary to " name proper persons to value the said materials and work ; " and find that, upon the said value being settled, the peti- " tioner must have allowance thereof, out of the sums above " mentioned, to be paid by him to the pursuers, and decern " and declare accordingly."

Against this interlocutor the present appeal was brought to the House of Lords, on the part of Magistrates and Town Council of Rutherglen.

*Pleaded for the Appellants.*—The contract was entered into by the appellants *optima fide*. They had no skill in bridge building, but they relied on the judgment and capacity of James Cullen, the person who, by the above contract, became bound to build it according to the form specified in the plan, and in a sufficient manner. A contract of this kind necessarily implies, that the undertaker of the work shall perform it in a secure and sufficient manner. One who undertakes to build a bridge, must necessarily be taken bound to build a foundation for it ; and although the contract be silent as to the particular dimensions and depth of the foundation, yet the contract ought not on that account to be rendered void and ineffectual, because it is reasonable to presume, that the man of skill, who undertakes to build a bridge, must necessarily have undertaken to build a suitable foundation for it, as there cannot be the one without the other. Hence, in this view, it was immaterial that nothing on this point was mentioned in the contract, because it was the duty of the respondent, in the very first instance, to have examined the bed of the river, in order to discover the depth to which the pillar or abutments would require to be founded, and what works would be necessary to secure their stability, and the expense attending the whole, before he undertook to contract to build the bridge. And, in these circumstances, it is somewhat irreconcileable to find that the " work, so far as executed, is neither conform to the contract

nor plan, nor such as can be of use for a sufficient bridge," and yet find the respondent relieved from the obligations of the contract.

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v.

*Pleaded for the Respondent.*—By the plan to which the contract refers, the abutments and pillars of the intended bridge, are each 15 feet from the foundation to the spring of the arch, and all on a level with the bed of the river, at the deepest. Laurie and the other reporters say, that it was necessary to sink the foundation of the pillars 9 feet under the bed of the river, at the lowest part of it; and to fortify it with wooden piles or a causeway, and to make the abutments 5 feet broader than represented in the plan. But nothing of all this is stipulated for in the contract. They are additional works, which it cannot be maintained the respondent is bound to execute under his contract. The respondent is only bound for every thing enumerated in the contract; but for nothing beyond it. He undertook to build a bridge, with abutments rising 15 feet from the lowest bed of the river, for £1900. To build one with a sunk foundation of the nature chalked out by the report, would cost an expense of £5000; and, in the whole circumstances, the appellants have little cause to complain of this interlocutor.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed, with this addition to the interlocutor of the Lords of Session of the 26th November 1772, after the words (when the same are advanced), insert (together with the costs of this suit, except those occasioned by this appeal.)

For Appellants, Ja. Montgomery, Al. Wedderburn.

For Respondents, Al. Forrester, Thos. Lockhart.

*Note.*—Unreported in Court of Session Reports.

LIBUT. ANDREW LAWRIE, - - - Appellant;  
CAPTAIN JOHN MACGHIE, and ANNE his } Respondents.  
Wife, formerly ANNE LAWRIE, and Others,

House of Lords, 17th March 1773.

**DEVOLUTION CLAUSE.**—Held, where a party takes an entailed estate, on condition of devolving one he already possesses, on the next

1773.

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heir of entail, that he is bound to do so to the heir pointed out by the entail, although the party who succeeds to both may have younger sons nearer the line of succession, whose possession would carry out the intention of the maker, of having the two estates separately and distinctly possessed.

Walter Lawrie, Esq. of Redcastle, executed an entail conceived in the following terms of destination, with a clause of devolution added thereto. Failing issue of his own body male and female, "to James Lawrie of Skeldon, my nephew, and the heirs male of his body; which failing, to William Lawrie, his brother german, also my nephew, and the heirs male of his body; which failing, to Walter Lawrie, my nephew, son to the deceased Thomas Lawrie, surgeon apothecary in Stranraer, my brother german, and the heirs male of his body; which failing, to the lawful daughters procreate of the body of the deceased Mr. James Lawrie, minister of the gospel at Dalrymple, my brother german, successively; the eldest being always preferable, and succeeding without division, and the heirs male to be procreate of their bodies," &c.

Then followed this clause of devolution, "That in case the above James Lawrie, my nephew, or his heirs male shall, by virtue of the present tailzie, succeed to the lands hereby provided and tailzied, then and in that case, he and his heirs shall be obliged to convey and dispone the lands of Over Skeldon in favour of the said William Lawrie, his brother, and the heirs male of his body: And if the said William Lawrie shall succeed to the lands hereby tailzied, and shall likewise succeed to the lands of Over Skeldon, then and in that case he shall be obliged to convey and dispone the same to the said Walter Lawrie free of any burden: And sicklike whoever else of the heirs of tailzie above mentioned shall succeed to the foresaid lands and estate hereby tailzied, and shall at the same time have in their person the right to the foresaid lands of Over Skeldon, shall be bound to convey the same in favour of the next heir of tailzie following the person."

Besides this deed, on the nephew James Lawrie of Skeldon's marriage, his uncle became a party to his marriage articles, whereby the said James Lawrie was not only expressly taken bound to convey Skeldon, but actually *per verba de praesenti* to dispone the same in terms of the tailzie.

1742.

Walter Lawrie, the maker, died without issue. His nephews, William and Walter, had both predeceased him without issue; and his estate of Redcastle then devolved on

his nephew James Lawrie of Skeldon, in virtue of the above entail.

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The next heir of entail, failing issue of James Lawrie's body, was Margaret Lawrie, the eldest daughter of Mr. James Lawrie, minister of Dalrymple, and mother to the appellant. On the pursuer's succeeding to Redcastle, she claimed the estate of Skeldon, and insisted that it should be conveyed to her, in terms of the condition or clause of devolution contained in the said entail. In an action brought by her, the Lords found that James Lawrie was bound to denude of the estate of Skeldon, and, in consequence of this judgment, the Skeldon estate was conveyed accordingly.

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MACOHIE, &amp;c.

Mr. James Lawrie dying without issue, the Redcastle estate also devolved on Margaret Lawrie; whereupon the present question arose, Whether she was obliged to divest herself of the Skeldon estate in favour of the next heir of entail; and if so, whether that heir of entail was her sister, Anne Lawrie, or her own son, the appellant? Hence the present action to determine that question.

1757.

"On the report of Lord Bankton, find that the defender Jan. 2, 1759. Margaret Lawrie ought to make up titles to and denude of the lands of Over Skeldon in favour of Anne Lawrie, and her heirs."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The apparent intent of the devolving clause in this entail being only to keep up two distinct separate representations, this would be more effectually carried out by confining the succession to the nearer heirs, than allowing it to deviate into more remote. Hence Margaret Lawrie's *second son* was the proper party in whose favour the devolving clause was conceived; and however reasonable, therefore, it might be to exclude Margaret Lawrie herself, and her *eldest son*, as her heir apparent, yet there was no shadow of reason for excluding the second son, or other younger children.

*Pleaded for the Respondent.*—This is merely a question of construction, which must depend on the intention of the maker. By the deed of entail, failing Walter Lawrie and his heirs-male, the estate was to go to the *lawful daughters successively* of the Rev. James Lawrie. And it is manifest that the deed binds the person succeeding to both the estates of Redcastle and Skeldon, to convey the Skeldon estate to the next *heir of entail following the person, and the heirs of his or her body so succeeding*; and if the person so

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succeeding, neglect or refuse to do so, a forfeiture is imposed, extending to *all the descendants of his or her body*. To Anne Lawrie, therefore, who is the *next heir of entail*, does the estate fall to be conveyed. Because Margaret having succeeded to both estates, her sister Anne, as heir of entail, and not Margaret's second son, is the party in whose favour this devolving clause is conceived, and in favour of whom the estate falls to be conveyed. And it is erroneous for the appellant to maintain that the words *heirs male of the body* apply only to those who are in immediate succession, and therefore do not exclude the younger sons of the contravener; because the heirs of the body signify not only the descendants in the oldest line, but all the descendants who are entitled to take the succession when it opens.

After hearing counsel,

Lord Mansfield observed, in giving judgment, that this was the clearest case that ever came before the House. He should affirm, but would refuse to give costs, because the appellant had the misfortune to be born between two estates, and to get neither.

It was ordered and adjudged that the appeal be dismissed, and that the interlocutor therein complained of be, and the same is hereby affirmed.

For the Appellant, *Ja. Montgomery, Al. Wedderburn, Al. Forrester.*

For the Respondents, *Andrew Crosbie, Tho. Lockhart.*

*Note.—Unreported in Court of Session.*

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(M. 16,776.)

ALEXANDER M'CLATCHIE of London, - *Appellant;*  
MARY BRAND or BURNET, Widow of WILLIAM }  
BURNET, Merchant in Dumfries, } *Respondent.*

House of Lords, 22d March 1773.

**DEED—INCAPACITY—PROOF—TESTAMENTARY WITNESS.**—Circumstances held insufficient to reduce a deed on the head of fraud and facility. Also held, reversing the judgment of the Court of Session, that the writer who executed the deed challenged, and who was an instrumental witness, is not, when adduced to prove the capacity of the maker of the deed at the time he executed it, an incompetent witness. Nor is he inadmissible on the ground of partial counsel, from having written into the Edinburgh attorney with instructions to defend this cause.

The deceased William Burnet, merchant in Dumfries,

married the respondent, and, by marriage articles of this date, he became bound to secure her a suitable liferent provision, in case of his predeceasing her, and also to make suitable provisions to his children in case there were issue of the marriage.

1773.

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v.  
BURNET.  
April 29, 1741.

There being no issue of the marriage, he, about eight years thereafter, executed a set of deeds in implement of the obligation set forth in the marriage articles, by conveying *all his* heritable and moveable property that he might be possessed of at death, to the appellant, his nephew, and his brother Robert M'Clatchie, now deceased, equally between them, under burden of all his debts, and specially of payment of £100 to his wife, the respondent, and £20 per annum as a free annuity during her life. By the second deed he conveyed to his said wife, in property, a dwelling-house in Dumfries, as also the household furniture, &c. therein. By another deed, he altered the plan of his settlement as to his wife's right, so far as to convey to her the liferent use of all his real estate, in place of the annuity of £20 Sterling per annum. It was on these deeds that the appellant's rights were founded.

But it turned out that the deceased, two years before his death, when he was greatly impaired in health of body,—of great age,—almost constantly in bed, and his memory and judgment affected, had been prevailed upon to execute a deed, conveying to his wife, the respondent, his whole heritable and moveable property, in absolute property, that might belong to him at the time of his death. This deed was not drawn out by the lawyer who had drawn the former deeds, but by a different legal gentleman, Mr. Archibald Malcolm, writer in Dumfries. Aug. 21, 1767.

Mr. Burnet died 7th July 1769: and, upon learning the July 7, 1769. contents of the latter deed, the appellant raised the present action of reduction to set aside the same, on the ground of fraud and facility, and that at the time the deed was executed, the deceased had fallen into a state of imbecility, and was not of disposing mind. Defences were lodged, denying imbecility, or the deceased's incapacity to execute the deed. A proof was allowed and reported. In taking the proof, Mr. Malcolm, the writer who drew the deed, was adduced as a witness to prove Mr. Burnet's health and situation at the time of executing the deed now challenged. To this it was objected, on the ground that Mr. Malcolm was the adviser of the settlement in question, and, in point of

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character, interested in the issue, and that he had been employed by the respondent as agent in this cause, and given partial counsel and advice therein. To this it was answered, that he never was agent in this cause for the respondent —he being a writer in the country, and not before the Court of Session. That when the action was first brought, he was employed by the respondent to transmit to her agent there, information and instructions about the suit, its defence, and the counsel to be employed. The commissioner ordered Mr. Malcolm's deposition to be taken down, to be sealed up separately, and transmitted to the Court.

On the merits, the appellant then maintained, 1st. That the mutual contract so made in 1767, and which deprived him of his rights, was a manifest fraud and imposition, practised upon Mr. Burnet, who had long prior thereto fallen into a state of imbecility, if not of total incapacity; and this the appellant endeavoured to support, both from the extraordinary nature and contexture of the deed itself, as well as from the circumstances attending its execution and the evidence brought, of Mr. Burnet's deliberate and firm resolution that the appellant should be his successor ; and, 2d. That it had been clearly proved that Mr. Burnet had, after a severe shock he had in 1765, through the decline of age and indisposition, fallen into such a state of dotage or second childhood, as to render him incapable of comprehending or executing any deed of importance. Besides, in the deed itself, there was a special clause, applicable to the possibility of one of them dying within sixty days, and the deed thereby left open to challenge on deathbed, for, in that event, it is provided that the former settlements in the wife's favour, were to revive, and be in full force. These being the circumstances of the case, it would be extremely wrong to allow the depositions of Mr. Malcolm to be opened and read, because, from the very nature of the action, which challenges the deed he executed, on the ground of fraud and imposition, and on the head of facility, he has an interest in supporting its integrity. On the other hand, the respondent maintained that the reasons of reduction had not been proved ; that fraud, imposition, or facility had not been proved. That old age was not incapacity,—that there was a distinction even to be taken between the weakness of old age, and total or partial deprivation of reason and judgment. And as to Mr. Malcolm's deposition, there was no reason alleged why it should not

be opened and read as evidence. He was a necessary witness respecting Mr. Burnet's capacity at the time of executing the deed in question : and his having been the attorney employed on that occasion, and receiving his instructions and directions from Mr. Burnet, was a very cogent reason for being examined as a witness. That this point had been settled in the case of the Earl of March against Anthony Sawyer, where John Dickie having been called as a witness Nov. 21, 1749. for the Earl, to prove the execution and delivery of a deed, to which he was an instrumentary witness: the Court of Session sustained the objection taken to his admissibility, but, on appeal, this was reversed in the House of Lords.

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The Lords, of this date, pronounced this interlocutor :— Nov. 28. 1771.  
“ Find that Archibald Malcolm cannot be admitted as a  
“ witness in this cause, and disallows his deposition to be  
“ opened, or to make a part of the proof; And further, find  
“ the reasons of reduction of the deed challenged not pro-  
“ ven, and assoilzie and decern.”

On reclaiming petition, the Lords adhered.

March 7, 1772.

Against this interlocutor the present appeal was brought, a cross appeal being taken in so far as the Court had found the witness incompetent.

*Pleaded for the Appellant.*—This was the case of a deed executed, not where the maker had no near relations to leave it to, but where, after many years endurance of the marriage, he had deliberately resolved to settle his means in a given way, so as they might reap the advantage. Accordingly, the deeds previous to that under challenge, were drawn out and executed in favour of the appellant, taking care to secure his wife with an ample provision in the event of her surviving him. Not content, however, with this, she devised means to have possession of the whole; and taking advantage of her husband's supervenient weakness, she prevailed on him to execute the deed in question. But when, to the real evidence of imposition appearing on the face of this deed, is added, the extreme secrecy and concealment attending its execution, the partiality of Malcolm, and prevarication of Copeland, the two instrumentary witnesses, joined with the evidence afforded by Mr. Burnet's former settlements, no doubt can remain as to the manner in which the deed was obtained. Yet the evidence of imbecility is so strong *per se*, as to be conclusive. It is proved his memory quite left him. He forgot the Sunday—forgot where his dwelling house in Dumfries stood—that he wavered and

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wandered in his conversation—became an object of observation and ridicule to the boys and soldiers in the streets of Dumfries, and the parties were so sensible of his being thus under the influence of disease, which would ultimately carry him off, that they inserted a clause in the deed challenged, giving validity to his former settlements, if the one then executed was found to be bad. In regard to the cross-appeal, it was quite right in the Court below to reject the evidence of Malcolm the agent, as a witness, both as an instrumentary witness, and also as having given partial counsel as agent.

*Pleaded for the Respondent.*—The several settlements of Mr. Burnet, from 1741 to the date of that under challenge, clearly shew his growing affection and regard for the respondent. Every new deed contains fresh marks of the grateful sense in which she was held. If, therefore, fraud is to be imputed to her, it must be one of many years' standing, and to have had for its source affection and duty. Mr. Burnet had no issue, and no near relation. The appellant had dropt all correspondence with him; and what step could be more prudent and proper, in the circumstances, than *that* taken by him, to leave his all to his wife? The proof taken in the cause clearly establishes, that he was, at the time of executing the deed, of sound disposing memory and judgment, and, though somewhat wasted by preceding indisposition and bodily infirmity, arising from old age, yet perfectly able of judging in his own affairs. And in regard to the objections for opening and reading Malcolm's deposition, which is made the subject of a cross appeal, the respondent submits, the fact that he was the writer employed to execute the deed, cannot render him an incompetent witness; how far it may affect his credibility is a different matter. He is, moreover, a *necessary witness* to speak to the maker's capacity. He was present at its execution, signed it as an instrumentary witness,—he is therefore competent; and the mere fact of his having transmitted instructions to the Edinburgh agent to prepare her defence in the action, does not affect him with partial counsel.

After hearing counsel,

LORD MANSFIELD said:

"That he did not agree with the judgment of the Court below,  
*Vide Craigie* on the point of the competency of Malcolm the agent, as a witness.  
 and Stewart's He recollects that he was counsel in a cause at their Lordships' Reports, p. bar in the year 1749, exactly similar to the present, only supposing  
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the wife to settle instead of the husband. It was that of the Earl of March *v.* Sawyer, on whom Lady March had settled a mortgage to a very large amount, he being her second husband; but the deed being found in an iron chest after her decease, and no proof of its being ever delivered according to the prescribed forms, Lord March endeavoured to set it aside; and it afterwards came to be contended, whether John Dickie, as being his lordship's agent and attorney in the cause, was competent to give evidence? This House was then of opinion, that though the objection might affect his credibility, it could not be pleaded in bar of his competency. I am therefore of opinion, in the present case, that Malcolm's testimony could not be refused, and that, on the whole, it was an incontrovertibly just exception to the general rule of law, that an agent, attorney, or solicitor, was always competent to give testimony in any cause in which they might be employed, where it is impossible to come to that species of evidence in any other manner whatever, and therefore necessary."

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It was ordered and adjudged that that part of the interlocutor of the 28th November 1771, complained of by the cross appeal be reversed. And it is declared that, to the purpose for which it was offered, the deposition of Archibald Malcolm ought to have been received as evidence and read. And it is further ordered and adjudged, that that part of the said interlocutor which is complained of by the original appeal, and also the interlocutor of the 7th March 1772, adhering thereto, be affirmed.

For Appellant, *E. Thurlow, Andrew Crosbie.*

For Respondent, *J. Montgomery, Al. Wedderburn.*

(M. 4392.)

**JOHN BANE STEWART, and Others, Lessees of** } *Appellants;*  
**Glenfinlas** - - - - }

**MARGARET COUNTESS DOWAGER OF MORAY,** } *Respondents.*  
**and FRANCIS EARL OF MORAY** }

House of Lords, 24th March 1773.

**LEASE—INCOMPLETE CONTRACT—POSSESSION—LOCALITY LANDS—**

**POWER TO LEASE.**—An offer for a lease was made in writing by several tenants, and the landlord's factor wrote in answer to the sub-factor, through whom the offers had come, that the landlord had read

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over the offers, and that the rent and duration of the lease were agreed to, but other points not fixed. He thereafter wrote as to those, and with instructions to get the lease drawn out, and signed by the tenants on stamp: This was done, and sent to him for signature, but the landlord kept it for two years, and died without signing it. In the mean time, he had allowed possession to be taken by the tenants;—on the faith of it they had proceeded to make dykes, and other improvements, and had paid two years' increased rent: Held, in all the circumstances of the case, that the lease was as effectual and binding, as if it had been signed by the Earl. Also, held that a lease may be granted by a farr, after he had granted the same lands in liferent locality to his wife, to take effect in the event of her surviving him.

James Earl of Moray had let his lands of Glenfinlas to several small farmers, who, previous to 1765, possessed them as tenants at will, or upon tacit relocation; but, his lordship being at this time desirous to place them on a different footing, so as to raise a permanent rental, employed his factors in 1763, to treat with these tenants about a lease. By his contract of marriage with the respondent, his countess, she had been at this time provided and seized in the liferent of these lands, as locality lands.

When letting his lands, the Earl's practice was to order the tenants to give in written offers to the factor, on that division of the estate where the lands lay, which were usually transmitted by him to Mr. Maule, the other factor at his Lordship's residence, and by him laid before him for approval or rejection. The answer was always returned through the same channel, and the letter of the factor to the tenants was considered as tantamount to the letter of his Lordship.

The lands of Glenfinlas having been held, as above described, by eight different tenants, upon their being informed by the factor, of the Earl's wish to have a lease, they signed and presented to his Lordship, a joint memorial as to certain improvements which they had done, expressing their willingness to do more, and to pay a little more additional rent, on condition of their being made “certain of the possession for a considerable space.” The tenants, thereafter, especially the chief of them, David Stewart, had an interview with Mr. Maule, whereupon the latter communicated his Lordship's intention to be, that they should send in an offer for a lease. Accordingly the tenants subscribed and delivered the following offer:—“We, David Stewart, John

" Stewart, John Bane Stewart, Donald Stewart, James 1773.  
 " Stewart, Robert Stewart, Duncan Stewart, and Alexander STEWART, &c.  
 " Stewart, present tenants and possessors of the lands and v.  
 " grassings of Glenfinlass, and Wester Bridge of Turk, do COUNTESS OF  
 " hereby make offer to the Right Honourable James Earl of MORAY, &c.  
 " Moray, our master, of the sum of £200 sterling money,  
 " of yearly rent, for a nineteen years' tack of the foresaid  
 " lands and grassings, with their pertinents, and that besides  
 " freeing and relieving his Lordship of all public burdens,  
 " conform to use and wont. In testimony whereof, we have  
 " subscribed these presents, at Glenfinlass, the 30th July,  
 " 1764 years." (Signed)

This offer was laid by Mr. Maule before the Earl, who wrote the other factor Mr. Moir, mentioning that the Earl had Aug. 13, 1764. read over the offer, "and, as I told you, he will insist for gold pounds; however, I shall endeavour to have the matter soon brought to some bearing." And in another letter, 19th September 1764, he says, "The Glen affair I have "not thoroughly adjusted; but the rent is to be 200 guineas; "and he has condescended to give a nineteen years tack; "but the closing I have not yet got settled, nor the steel "boll, with the entry, which must lie over until I return "from the north, which I hope will be at the end of next "month, and then will do my best to have every thing "finished concerning it. *The two most material things are "done, the rent and number of years."*

These letters were communicated to the tenants by Mr. Moir, the factor, as appears from the latter's letter to David Stewart, of date 23d September 1764.

Sep. 23, 1764.

Soon after Mr. Maule's return from the north, the other points were adjusted; and he wrote Mr. Moir with particular instructions to draw out the lease, the tenants having agreed to give the rent sought by the Earl. A lease was drawn out, extended on stamp, signed by all the tenants, and sent by Mr. Moir the subfactor, to Mr. Maule, the other factor, for his Lordship's signature. When they signed it, David Stewart got Mr. Maule's letter of instructions to Mr. Moir to keep as their security and warrant until the lease was signed, but this was lost. They had possession under their old rights, but their possession was continued under the new lease from Whitsuntide 1765; and under this they had paid two rents to his Lordship's factor, Mr. Moir, for two half-years, when thereafter the Earl died, without signing the lease on his part.

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The Countess having been provided with a locality out of these lands, and considering that the lease, which being signed only by one of the parties, was informal, and therefore not binding on her, brought an action of removing against the tenants before the sheriff, and having obtained decree in absence, the tenants brought a suspension of the same. The Countess separately maintained, that supposing the lease formal and binding against the heir, yet it was still ineffectual as against the Countess, because she, being infest in a liferent locality out of these lands prior to the date of the lease, the Earl could not grant any such lease to her prejudice, to affect materially her liferent, after it should open, without her consent

Jan. 29, 1772. The Court of Session, of this date, repelled the reasons of suspension, and decerned; but, on reclaiming petition,

July 23, —— they found "that the late Earl of Moray, notwithstanding "of the prior liferent, by way of locality granted to the "Countess, and her infestment thereon, had right to grant "tacks of the lands contained in the said locality, effectual "against the Countess; but find that the lease in question, "not having been regularly executed by the said Earl, is "not effectual against the said Countess; and therefore in "so far adhere to their former interlocutor, finding the let- "ters orderly proceeded, and refuse the petition, and de- "cern; and ordain the suspenders to remove from their "houses, biggings, yards, and grass, at Whitsunday 1773, "and from the arable lands at the separation from the "ground of the crop 1773."

Against these interlocutors the tenants brought the present appeal; and a cross-appeal was brought by the respondents, regarding that part of the last interlocutor which found that the Earl, notwithstanding the liferent locality, had power to grant the lease.

*Pleaded by the Appellants.*—Although a probative writing, duly executed on stamped paper, be necessary to the valid constitution of a lease, yet a lease of lands may be binding, though the instrument be defective. Thus, if there be writing of some kind, though wanting the usual solemnities, and improbatative, yet if possession follow, and acts are done on the faith of it, the lease will be good. In the present case, letters passed between the parties—an offer on one side, agreed to in the essential parts on the other, and thereupon a regular stamped lease drawn out by the instructions of the landlord's factor, signed by the tenants, and handed to the

factor for the Earl's signature. Upon this possession follows, and two years' rents are paid and accepted of by the landlord's factor, under the new lease. These latter facts, *rebus ipsis et factis*, constitute such a *rei interventus* as effectually cuts off the power to resile, and sufficiently validates the defect in the lease, arising from the Earl not having signed it before his death. Besides, as by the tenants signing the lease, they were effectually bound to every obligation ; and as they had actually proceeded to implement these obligations, in paying rent, making improvements, building dykes. &c., it was not in their power to recede after delivering this lease to the Earl, from their bargain, so the Earl ought also to be held bound, by retaining the lease for so long a time in his possession, though unsigned, and was not entitled to hold himself loose, by not signing it, while the tenants were bound to him. Besides, it is in evidence, that during the two years he was in possession of the lease, the Earl had signified his acquiescence in it, which acquiescence was communicated by Mr. Maule to Mr. Moir, and by the latter to the tenants, who proceeded, on the faith of this, to lay out money on improvements, and to pay the increased rents, as under a concluded lease. *Separatim*, and as to the cross-appeal, if the lease which was thus homologated, and on which possession followed, was good against the Earl, it was for the very same reason good against the Countess his lady, because her liferent locality of these lands, which was to take effect if she survived the Earl, and only at his death, did not debar him from granting leases of the lands so set apart for her liferent provision.

*Pleaded for the Respondents.*—By the law of Scotland, to the right constitution of a lease for more than one year, writing is necessary in order to bind the parties, and this writing must also be probative and stamped. The lease in question, not being subscribed by the Earl, could not bind him, and if so, could not be raised into a lease for 19 years by mere acts of homologation. The writing and several transactions which preceded the written lease, cannot amount to more than a verbal treaty to execute a lease for years ; but there is nothing better settled in the law of Scotland than that, however explicit such verbal agreements may be made, they have no efficacy but as leases for one year, and consequently, however strong these acts of homologation might be, they could not alter the nature of the right or agreement, by converting a lease for one year into a lease

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for many. But in truth, the acts of homologation pleaded are ineffectual as such. They were not the Earl's acts. The rents were not received, nor the discharges granted by him; and he merely received the money, without knowing the particular source; but whatever may be the effect of receiving such rents otherwise, surely it can never have the effect of converting a contract, unsubscribed by one party, into one regularly subscribed by both parties. Separation. The Countess had acquired the liferent of these lands by her marriage contract; and as, after the constitution of this right, the Earl's own power over these lands was reduced to the nature of a naked liferent, he could not grant a lease so as to affect her liferent, although he might have done what he pleased with reference to his own.

After hearing counsel, it was

Ordered and adjudged that *that part of the interlocutor of 23d July 1772, complained of by the cross appeal be affirmed. And it is further ordered and adjudged that the interlocutor of the 29th January 1772, and also so much of the interlocutor of 23d July 1772, as are complained of by the original appeal, be reversed; and it is hereby declared, that, under all the circumstances of this case, the lease in question is as effectual and binding as if it had been signed by James, late Earl of Moray, deceased; and it is further ordered, that the reasons of suspension be sustained.*

For Appellants, *Al. Wedderburn, Andrew Crosbie.*

For Respondents, *Ja. Montgomery, Thos. Lockhart.*

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(M. 15,425.)

ROBERT HAY, Esq. second Son of Alexander Hay of Drumelzier, Esq. GEORGE MARQUIS OF TWEEDDALE,	} Appellant; -      Respondent.
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House of Lords, 6th April 1773.

ENTAIL.—Clause of Devolution in a Deed of Entail.

Sir Robert Hay was proprietor of the estate of Linplum, and having no issue of his body, but being attached to his family and name, he executed a deed of entail in regard to

his heritable estate, having two objects : First, To secure the estate in favour of a particular line of heirs ; and, second, To establish a separate and distinct representation of himself and family ; and being related to the noble families of Tweeddale, Drumelzier, and Roxburgh, he anxiously provided against his own estate being sunk in theirs. For that purpose, he disposed his estate of Linplum to his sister Margaret in liferent, " and to the second lawful son to be " procreated of the body of the Most honourable John Mar- " quis of Tweeddale, and the lawful heirs male of his body " in fee ; whom failing, to the said Marquis' third lawful " son, and the lawful heirs male of his body ; and so on to " all the said Marquis, his younger sons, one after the other ; " and failing all the said Marquis his younger sons, and the " lawful heirs male of their bodies, to the Right honourable " Lord Charles Hay, brother german to the said Marquis of " Tweeddale, and the lawful heirs male to be procreate of " his body ; whom failing, to the Right honourable Lord " George Hay, brother german to the said Marquis of " Tweeddale, and the lawful heirs male to be procreate of " his body ; whom failing, to Alexander Hay, second son to " Alexander Hay of Drumelzier, and *his lawful heirs* " *male* ; whom failing, to the Honourable John Hay of " Belton, Esq., and *his lawful heirs male* ; whom failing, to " the Honourable John Hay of Lawfield, Esq., and *his law- ful heirs male* ; whom failing, to Lord Robert Kerr, se- " cond lawful son of the present Duke of Roxburgh, and *his* " *lawful heirs male*," &c.

Besides the usual prohibitory, irritant, and resolutive clauses and conditions of using arms, &c. there followed this clause of devolution, upon which the present question arises : — " That if any of the heirs of entail before mentioned, or " their descendants, shall happen to succeed to the estates " or titles of Marquis of Tweeddale, Hay of Drumelzier, " Duke of Roxburgh, then and in that case, the right of " my lands and others before mentioned in the person of such " heir of entail, so succeeding to any of the foresaid other " estates or titles, shall cease and terminate, and that from " the Whitsunday or Martinmas next after he shall have so " succeeded ; or in his option, next after he shall have a se- " cond lawful son attained to the age of fourteen years, " during which space I herewith dispense with the said heir " of entail his using my surname and coat armorial ; and the " right of the lands and others foresaid shall fall and devolve

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"to his said second lawful son, and to his heirs male, and  
 "so on, as often as the same case happens, in all time  
 "thereafter."

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When Sir Robert Hay died, the Marquis of Tweeddale had then but *one* son; and, in consequence, the succession to Linplum estate, under the above destination, devolved upon the next heir called in the entail, namely, Lord Charles Hay, the Marquis' immediate younger brother, he being the first substitute called after the younger sons of his brother the Marquis;—Upon Lord Charles' death without issue the succession then devolved on the respondent, Lord George Hay, his younger brother next called in the deed, who, upon the death successively of the Marquis of Tweeddale and his only son without issue, also thereafter succeeded to the titles and estates of Tweeddale. Both estates being thus united in him, the present action was raised by the appellant. Alexander Hay of Drumelzier's second son was at this time dead, without issue, but the appellant, his brother, and heir male, being advised that, by the respondent's succession to the titles and estate of Tweeddale his right to Linplum had terminated, he claimed the same as the next substitute called, and entitled to succeed on that event.

The respondent resisted this, on the ground that as his own heirs male had not failed, and as it was more than probable he would have a second son, he was entitled to hold the estate during his life, until he should have a second son arrived at the age of fourteen.

June 20, 1771. The Lord Ordinary, of this date, found that, under the special proviso in the deed, the respondent had the option to hold the estate of Linplum until he should have a second son entitled to succeed. On representation, the case was

Feb. 19, 1772. reported to the Court; and the Court, of this date, ad-hered.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded by the Appellant.*—From the whole frame and tenor of the deeds in question, it was manifest that it was Sir Robert Hay's fixed and determined purpose to secure his estate of Linplum limited to a particular series of heirs different from the persons who should succeed to any of the other three estates of Tweeddale, Drumelzier, or Roxburgh. This intention is fortified by an entail, containing prohibitory, irritant, and resolutive clauses, to prevent every

heir in the right of the estate from doing any act destructive of the succession so arranged. In discovering and ascertaining who is the heir entitled to succeed, the *VOLUNTAS TESTATORIS* is the supreme law, and must govern. The grand intention of this entail was, to prevent his estate of Linplum being united or absorbed with those of Tweeddale, Drumelzier, and Roxburgh. He had a strong attachment to John Marquis of Tweeddale: and, in regard to him, he provides, that if the estate shall devolve to the second lawful son of the said Marquis of Tweeddale before his existence, then it shall be lawful to the said Lord Charles Hay, or to the nearest heir of entail in being at the time, to enjoy the rents and profits thereof, until the first term of Martinmas or Whitsunday, inclusive, following the birth of the said Marquis' second son, "when he is to denude;" but having so favoured John Marquis of Tweeddale, it did not follow that any subsequent Marquis of Tweeddale, who should succeed to both estates, was to enjoy the same privilege; which privilege was entirely confined to John Marquis, and to be an option to hold the estate until his right should terminate by the birth of his second son, or in his option, until he attained the age of fourteen years complete. Any other construction than this would entirely frustrate the chief object the entainer had in view, because, as the estate is devised to the respondent *nominatim, and the heirs male of his body*, according to this destination the respondent's eldest son would be entitled to succeed, and so destroy the whole intention of keeping the Tweeddale and Linplum estates disunited.

*Pleaded for the Respondent.*—The second son of the family of Tweeddale was the *prædilecta persona*, and the intention of the entail was, to give to John Marquis of Tweeddale, or the Marquis of Tweeddale for the time, the enjoyment of Linplum during the non-existence or non-age of his second son. The words used to express this are too plain to admit of doubt, and no evidence of contrary intention will warrant departure from the strict words of an entail. All construction, therefore, with the view to expiate the intention of the maker is excluded, where the words are clear and express, and where the departure from this is fenced by irritant and resolute clauses, and the penalty of forfeiture. The Marquis (respondent) has the power of holding "till the term of Whitsunday or Martinmas next after he shall have a second lawful son, attained to the age

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of fourteen years." These words are positive and express, and unless the appellant can shew they were different from what they mean, any inquiry into intention is so much labour futile and vain. Nor was it in the contemplation of the maker that the second son should be in *esse* at the time of the junction of the two estates. On the contrary, it plainly appears that a second son born after this event was in his view; and it would be irrational to suppose that he was to be deprived of his right merely because he accidentally happened to be born a day or two after the conjunction.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and  
that the interlocutors therein complained of be affirmed.

For Appellant, *J. Montgomery, Al. Wedderburn.*

For Respondent, *Henry Dundas, Al. Forrester.*

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(M. 14,179.)

JOHN HEPBURN of Edinburgh, Surgeon, and }  
WILLIAM CHEAP, - - - - - } *Appellants;*  
GEORGE AIKMAN of Glasgow, Merchant,      *Respondent.*

House of Lords, 30th April 1773.

SALE—EXCEPTIONABLE TITLE.—Circumstances in which held, that a purchaser, according to the terms of the sale, was bound to take the title as it stood, or give up the bargain.

The premises rented and occupied by Cheap as a ware-room, in the High Street, Edinburgh, were advertised for sale, referring for particulars, &c. to George Jeffrey, writer in Edinburgh. In answer to this advertisement, the appellant Hepburn wrote Jeffrey, offering £150 entry at Whit-sunday then next, and obliging himself to stand by this offer, under a penalty of £30. On the same day, this offer was accepted of, in the following terms: "I have yours of this date, offering me the sum of £150 sterling, for the ware-room presently possessed by William Cheap, Linendraper, which I am empowered by George Aikman, merchant in Glasgow, the proprietor, to dispose of; and I hereby, on the part of Mr. Aikman, accept of your offer, and shall execute

"the deeds necessary with your first conveniency; your 1773.  
"entry to be on Whitsunday 1771, and you to grant bond,  
"with security to my satisfaction, payable at that term; the <sup>HEPBURN, &c.</sup>  
"disposition to bear absolute warrandice; and I oblige Mr. <sup>v.</sup> AIKMAN.  
"Aikman to stand to this bargain, under the penalty of £30  
"sterling, attour performance."

After this bargain was thus completed, Hepburn having been solicited by Cheap the tenant, to let him the wareroom, he declined, but offered to sell him the premises, which was accordingly done at £155. Upon this Cheap came in the room and place of Hepburn, and when the term of entry arrived, he made to Jeffrey a tender of the price, on his giving such a title as he himself might be expected to give, in case of his selling, or borrowing money thereon, failing which, the seller to dispone other estate of equal value, as a collateral security or warrandice against eviction. The respondent refused to accept the money under these conditions, and offered only personal warrandice. Cheap made a second tender, requiring a good and proper title, with absolute warrandice, but this was also refused. Having thus done every thing to fulfil their part of the contract, matters lay over in this state until the seller, respondent, brought the present action for the price, against Hepburn, and also concluding that he should be bound to accept a disposition to the same, containing absolute warrandice, or, in case it should be found that he is not bound to accept of the title as it stands in the seller's person, that the bargain should be declared void and null, and the defender, Hepburn, liable in the penalty stipulated. The appellant, Cheap, afterwards appeared as a party for his interest.

Of this date, the Lord Ordinary found, "That Hepburn Jan. 28, 1772.  
"was not liable for the price, until a sufficient progress was  
"produced. And, on representation, he again found, "That July 22, 1772.  
"the respondents, (appellants Hepburn and Cheap,) are  
"not bound, and cannot be compelled to give up the bar-  
"gain which the respondent (appellant) John Hepburn  
"made with the representer, and that they are not liable  
"to pay the price of the subjects sold, till a sufficient pro-  
"gress is produced. On reclaiming petition to the Court, Dec. 10, 1772.  
"the Lords found, "That the defenders (appellants) are  
"bound either to accept of the disposition and progress  
"offered, or to depart from the bargain, and repone the  
"petitioner (the respondent) to the possession, and in re-  
"spect it appears that William Cheap knew the defect in

1773. "the progress, at the time when he made the bargain

HEPBURN, &c. "with Hepburn; therefore, find him liable in the expense  
v. of process; the account thereof to be given in to Court,

AIKMAN. "and remit to the Ordinary to proceed accordingly."

Dec. 19, 1772. On another reclaiming petition the Court adhered. And, in terms of the remit back to the Lord Ordinary, his Lord-

Jan. 4, 1773. ship, of this date, pronounced this interlocutor:—"Appoints  
"the defenders to declare their option whether they will  
"accept of the disposition and progress offered, or depart  
"from the bargain, in terms of the interlocutors of the  
"whole Lords, and that betwixt and the 22d current, with  
"certification."

Against these three last interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—When the appellant Hepburn contracted with the seller, he was ignorant of any defect in the title, but relied on a good title being given. Whatever Cheap may have known about the title when he bargained is immaterial, as he came into the right and place of Hepburn, in Hepburn's contract with the seller; and Cheap was expressly told that it was incumbent on the seller, by that contract, to give an unexceptionable title, and on this Cheap, as well as Hepburn, relied and acted throughout. Besides, the seller is in a condition to give a good title, by obtaining the heir's consent, or proceeding by adjudication in implement. In any view, the expenses of this suit ought not to be thrown upon the appellants, who, on the contrary, ought, in the whole circumstances, to be held entitled to their costs.

*Pleaded for the Respondent.*—The terms of the bargain with Mr. Hepburn were, that the disposition should bear absolute warrantice, which was meant and understood to cover all defects in the title. When the flaw in the title was discovered, the parties agreed to refer the matter to a conveyancer for his opinion, whether any, or what security the seller should give Hepburn; and had he retained the purchase, the matter would have been settled long ago to the satisfaction of both. But the appellant Cheap purchased in the full knowledge of this defect in the title, and, therefore, cannot be heard to insist for a good title, or to insist on the purchase, and yet refuse payment of the price until that good title be produced. If the title be defective, his obvious course is either to give up the bargain, or pay the

price. He cannot refuse both, and at same time retain possession of the subjects purchased. The respondent's alternative claim is therefore fair and reasonable, that he accept the progress as offered, or void the agreement and possession.

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After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed,  
and the interlocutors complained of be affirmed, with  
£100 costs."

For Appellants, *Al. Wedderburn, E. Perryn.*

For Respondent, *J. Montgomery.*

MISS ANNA BRUCE, - - - - - *Appellant;*  
JAMES BRUCE CARSTAIRS, Esq. - - - - - *Respondent.*

House of Lords, 11th May 1773.

**ENTAIL—EXERCISE OF POWER—PROVISION.**—In an entail power was given to the heirs of entail to burden the estate with provisions to their husbands, wives, and children, "such as the estate could conveniently bear and allow." In 1748 the heir in possession burdened it with a provision of £1000; and thereafter, in 1759, burdened it with a second bond of provision to the same party for £1000. Held, in an action for payment of both bonds, that the heir in possession had not exceeded his powers, and that by the first bond his powers were not so exhausted as to prevent him from granting the second.

Sir William Bruce entailed his estate of Kinross upon himself and the heirs-male of his body; whom failing, upon a series of substitutes. It contained the usual prohibitory, irritant, and resolutive clauses against alienation and burdening the estate, from which were excepted his own male descendants. But power was given to the "haill heirs of "taillie and provision, to provide their husbands, wives, "bairns, and children, to competent and convenient liferent "portions and provisions, such as the said estate may conveniently bear and allow, and shall be agreed to by two "of the nearest relations, one on the father's side, and one "on the mother's side, these not to exceed —." A blank was left for the amount, but not filled up.

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He also entailed the estate of Arnot, subsequently acquired by him, worth £300 per annum, on the same persons, except in one article, where he limited this of Arnot to the heirs-female of his daughter by her first marriage with Sir Thomas Hope, by which arrangement the two estates stand vested in separate persons, the appellant and the respondent.

Sir William died in 1709, and was succeeded in both estates by his only son, upon whose death, without issue, both estates came to his only sister, Anne, Lady Hope, who, by her first husband, had two sons—Sir Thomas and Sir John Bruce Hope—and by her second husband, one son, James Bruce Carstairs, the respondent's father, and three daughters. On her death both estates descended upon her eldest son, Sir Thomas Hope, who, dying without issue in 1740, was succeeded by his brother Sir John Bruce Hope. Sir John had three sons, who all predeceased him without issue, and one daughter, of his second marriage, the present appellant, and by his death in 1766, the Kinross estate came to his half-brother, the late James Bruce Carstairs, and that of Arnot to the appellant.

The last Sir John Hope, in virtue of the powers conferred upon him by the Kinross entail, charged the estate with provisions, one of £1000 in 1748, and another for £1000 in 1759, by heritable bonds over the estate. In granting these he had, as provided by the entail, the consent of the nearest relation, on the father and mother's side, concurring thereto.

The question was, Whether the appellant was entitled to recover payment of both bonds, and whether this double portion was not an unfair exercise of the power conferred?

The Lord Ordinary at first repelled the defences as to both bonds, holding them as legally due and exigible; but Dec. 15, 1770. afterwards, of this date, he found that the "bonds of provision of £2000 executed by Sir John Bruce in favour of "his daughter Miss Bruce, his only child, besides his heir, "with consent of two of the nearest friends, was a rational "deed, conformable to the will of the entailor; but then, "considering that the bonds were kept by Sir John without "delivery, and not intended to be effectual till his death, "before which time Miss Bruce became heir-presumptive to "him in the estate of Arnot, and in other valuable subjects, "and ceased to be a bairn or child, in the sense of the "entail, needing a portion or provision, finds that Miss

" Bruce, now of Arnot, has no claim to the said sum of £2000, not only *quia res devenit in casum a quo incipere vel potuit*; but also because a consent adhibited by the nearest friends to a rational provision in favour of Miss Bruce, a younger child, not otherwise provided, will not infer their consent that she should be entitled to any provision after so remarkable a change of circumstances in her favour, and therefore assoilzies."

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On reclaiming petition the Court altered, and repelled the Feb. 26, 1772. defence, in so far as concerns the bond of provision granted by the deceased Sir John Bruce to the petitioner, in the year 1748; but sustain the defence *quoad* the bond of provision granted by him to her in the year 1759, and remit to the Lord Ordinary to proceed in the cause accordingly."

Against these last interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The clause of the entail enabled Sir John Bruce to charge the Kinross estate with portions to his younger children, "competent and convenient, and such as the estate may conveniently bear." Under this clause Sir John possessed a discretionary power to grant such provisions; and, in granting the £2000 in question, he has not exceeded or abused that power, and not being limited in the *amount* of the provision so to be given, the Court have no power to control what he did, or restrict the provisions so made. This the more especially holds, where the provision so conferred was rational, competent, and such as the estate could bear. He had then only one son and daughter, and no probability of more children. It was this which induced Sir John to execute the second bond, in regard to which the Court of Session have sustained the defence; but that bond, granted in 1759, was just as good as the first. It was granted with the consent of his son, and the two nearest relations on the father and mother's side. It was rational in itself, and, besides, conformable to the will of the entainer, and if conformable to the will of the entail, this rationality cannot in the least be affected by the chance circumstance of the appellant's succeeding to the estate of Arnot; and the daughter's provision is not voided thereby, either at common law, or by the words of the entail. The debts affecting the estate of Kinross amount to £7000; the rent is £1000 per annum, so that the estate is well able to bear a charge of £2000 more.

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*Pleaded for the Respondent.*—The entail requires that the provisions be “competent and convenient, such as the estate ‘may conveniently bear.’” Here the estate was heavily burdened; and, looking to the circumstances of the appellant, (Sir John’s daughter,) who has been otherwise amply provided for, the second bond for £1000 was both unjust and irrational. Burdened already with £7000, the sum of £2000 was more than the estate could conveniently allow, and consequently Sir John has exceeded the power of burdening given him by the entail. Besides, by the execution of the first bond for £1000, which was ample and sufficient in the circumstances, this power ought to be viewed as having been thereby extinguished, so as to foreclose him from again resuming a power which had been already fully exercised in terms of the entail; and no consent of the relations on the father and mother’s side could validate such an exercise of the power, unless specially conferred by the deed.

After hearing counsel, it was

Ordered and adjudged that the several parts of the interlocutors complained of in the appeal, so far as they sustain the defence *quoad* the bond of provision granted by the deceased Sir John Bruce to the appellant in 1759, be reversed. And it is further ordered, that the defence be repelled, and that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For the Appellant, Ja. Montgomery, Al. Wedderburn.  
 For the Respondent, Al. Forrester, Dav. Rae.

Unreported in Court of Session.

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JOHN COLTART,	-	-	-	Appellant;
WILLIAM FRAZER,	-	-	-	Respondent.

House of Lords, 28th January 1774.

**SERVITUDE—THIRLAGE.**—The servitude of thirlage cannot be constituted by usage of grinding corn at a mill, and paying insucken duties, without written title astriciting the lands to the mill; and though these may have been originally astricted, yet where, by the subsequent charters and title, these are freed and released therefrom, this must govern the question.

The lands, miln, multures, and appurtenances of Kirk-

patrick-Durham, in the Stewartry of Kirkcudbright, belonged anciently to the Barony of Newabbey, and afterwards to the Maxwells of Nithsdale. In 1696, William Maxwell, Earl of Nithsdale, was served heir "in totis integris quadraginta " novem mercatis terrarum et duabus solidatis terrarum de " Kirkpatrick-Durham, videlicit, quadraginta solidatis ter- " rarum de Turbarrock, &c. quadraginta solidatis terrarum " Drumconchra et molendina earundem cum omnibus et sin- " gulis suis annexis connexis," &c.; and he thereafter sold the lands of Drumconchra, being part of these lands, and barony of Kirkpatrick-Durham, to Robert M'Clellan, excepting from the disposition thereof "three load of dry " multure corn, due and payable out of the said lands to " Robert Johnstone of Keltown, with £3 Scots of money, " also due to him, so that the said Robert his right is re- " stricted thereto." Upon these titles M'Clellan resigned the lands, &c. to his Majesty, lawful superior thereof, and obtained a charter in 1715 from the Crown, in terms of the former charter obtained by the Earl of Nithsdale, conveying the lands of Drumconchra "cum molendinis multuris et " earum sequelis," &c., with a reddendo as in the former charters 1706 and 1708, of £5. 3s. 4d. Scots, *pro omni alio onere exactione*, &c. These subjects, with the multures, were afterwards acquired by the respondent's father; and the other lands of the Barony of Kirkpatrick-Durham remained for long in the family of Nithsdale, and were afterwards acquired by the appellant, and described as "All Sep. 22, 1763. " and whole the miln of the forty-nine merk two shilling " land of Kirkpatrick, lying in the parish thereof, and stew- " artry of Kirkcudbright, commonly called the miln of Kirk- " patrick-Durham, and haill pertinents thereof, and astricted " multures and sequels due and in use to be paid to the " said miln, out of the said forty-nine merk two shilling " land of Kirkpatrick-Durham." Under this title the appellant, as proprietor of the mill, which was within the bounds of both lands, claimed the multures of all grindable corn or flour on the lands of Drumconchra, which he contended was a part of the barony of Kirkpatrick-Durham, all the lands of which were astricted to his mill.

The appellant accordingly raised the present declarator of astriction, stating his title to the miln of the said barony; also the ancient immemorial usage and constant custom of the proprietors of the said barony, and among these the

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proprietor of Drumconchra, and their tenants grinding their corn at the said miln, and paying therefor certain rates and quantities of multure, and concluding that the several defenders, among whom was the respondent, should be decreed to pay the same. In defence to this action, besides several objections to the title, such as that no sufficient title was adduced to the mill, and that no decrees or acts of the Barony or Multure Court were produced, the respondent denied that his estate of Drumconchra formed any part of the forty-nine merk two shilling land of Kirkpatrick-Durham, and that these lands were never erected into a barony—that they were never thirled to his mill of Kirpatrick-Durham. It was admitted, that the purchasers of the lands of Drumconchra had been in use to grind the greatest part of their corn at this mill, but only because it was more convenient than any other, and not from any obligation which bound them to the miln.

The Lord Ordinary, by various steps of procedure, pronounced an interlocutor ascertaining the thirlage claimed against the said lands of Drumconchra, and against the lands of some others of the defenders. And, on representation, he pronounced this interlocutor, finding “that the astriction established by this and the former interlocutor is “an astriction of *omnia grana crescentia*, and extends not “only to oats, but to all other kinds of grain which may “happen to grow upon the lands astricted: Finds that the “defenders have conducted their defence in a manner high-“ly improper, in denying all astriction to the mill libelled, “when in fact they, or most of them, were astricted by their “own title-deeds.”

**Feb. 4. 1768.** The respondent, conceiving his case different from the other defenders, again represented in his own name alone; whereupon his Lordship, of this date, pronounced an interlocutor, finding that the respondent's “lands of Upper and “Nether Drumconchras are part of the said lands of Kirk-“patrick-Durham, and that the possessors thereof have been “immemorially in use of grinding their whole corns at the “mill of Kirkpatrick-Durham, and of paying the heavy in-“town multures libelled: Finds that the said immemorial pos-“session, joined with the other circumstances of this case, “afford sufficient presumptive evidence that the said lands “of Drumconchra were originally astricted to the parson's “mill. And finds that the charters founded on by the de-

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" fenders, as explained by the possession of intown multures which has followed since that time, do not prove that it was thereby intended to discharge the obligation of thirlage *quoad* the defender's lands."

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On reclaiming petition for the respondent, the Court, of this date, sustained the defence; and found the defendant's (respondent's) lands not thirled to the pursuer's mills; and, on further reclaiming, the Court adhered. Dec. 13, 1768. Mar. 9, 1769.

Against these two last interlocutors the appellant appealed to the House of Lords.

*Pleaded for the Appellant.*—The lands of Over and Nether Drumconchra were part of his forty-nine merks two shilling land of Kirkpatrick-Durham, and that this forty-nine merk two shilling land was a barony, and was so called in the old charters and titles of the same; and therefore Drumconchra passed and was astricted as part and pertinent of the greater lands. From the title deeds, it was clear that the whole lands of the barony were astricted to the mill in question, and the proprietors of Drumconchra, as well as the other parts of the barony, have been in immemorial use of grinding their corn, and therefore must now, with the others, be liable to this servitude. Nor is it any answer to say, that the subsequent three charters of the respondent, in 1706, 1708, and 1715, contain a tenendas clause releasing Drumconchra from the servitude of thirlage to the appellant's mill, because no tenendas clause in any charter can have this effect, unless it expressly corresponds with the dispositive clause, and in none of these three charters are those multures conveyed by the dispositive clause.

*Pleaded by the Respondent.*—Every servitude or burthen whatsoever affecting land property must appear in the title, and from the record: and it is to these latter alone that every purchaser has recourse for information to see what burdens affect the same. In this case, the records, the title-deeds, and the leases of the estate, all demonstrate that these lands are free from the servitude of thirlage claimed. And, even supposing these lands to have been originally astricted, it is quite clear that this servitude is, by the latter titles, expressly discharged. The servitude of thirlage by law, must be constituted either by the title deeds of the lands, or by some other deed referring thereto: and such right cannot be acquired, by prescription alone without such title. The usage, therefore, of grinding corn at the mill,

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and paying the high duties of insucken multure, must go for nothing; and the mere voluntary choice of the tenants, to which the landlord was in no way consenting, resorting to this mill, (very likely because most convenient to themselves), could not constitute a servitude against the respondent, their landlord.

After hearing counsel, it was  
Ordered and adjudged that the appeal be dismissed, and  
that the interlocutors therein complained of be affirmed.

For the Appellant, *Ja. Montgomery, Al. Wedderburn.*  
For the Respondent, *Alex. Ferguson, Ar. Macdonald.*

Not reported in Court of Session.

**JOHN ANGUS, Merchant in Edinburgh,  
THOMAS MANSON, Writer in Edinburgh,**

*Appellant;*  
*Respondent.*

House of Lords, 22d March 1774.

**BANKRUPTCY—STATUTE 1696.**—Circumstances in which held deposition of a bill in the hands of a creditor, by his debtor, within 60 days of bankruptcy, reducible under the statute 1696, c. 5.

This was an action of reduction raised to set aside a deposition of a bill given to a creditor by his debtor in security of his debt. The bill was not assigned by deed of assignation. But it was alleged that this bill was indorsed by Farquhar, the bankrupt, to Angus the creditor, which was supported by general circumstances presumptive of the fact: and by a letter under the hands of the creditor, it was proved that he held this bill as security for his debt; and it was therefore concluded that the transaction was reducible under the statute 1696, as an unjust and unlawful preference or security given to one creditor to the prejudice of the others, within 60 days of Farquhar's bankruptcy. In defence, it was contended that the statute only applied to dispositions, assignations, "or other deeds," granted in security of prior debts, and not to the indorsation or deposition of a bill.

The Court of Session held that such a transaction fell under the statutory words, *all assignations* "and other deeds," and therefore reduced and decerned. *Vide Morison, App. "Bankrupt," No. 7,* for full report of case.

The case was appealed to the House of Lords.

*Pleaded for the Appellant.*—That no proof had been brought of the indorsation of these bills, and that the Court had proceeded merely on conjecture and probability. But even supposing such indorsation had been made, the transaction would not have been voidable under the act 1696, but would have remained good. Indorsation of a bill is considered as payment in cash; and if Farquhar really indorsed this bill on 5th January to the appellant, his debt of £160 was thereby extinguished, leaving him creditor to the appellant for the balance £95. The mere indorsation cannot surely be construed either into a *disposition, assignation, or deed*, and these alone are declared void by the statute if granted for the “*creditors satisfaction or further security,*” but a bill is not usually granted for these purposes, but for payment and extinction of debt. But if this holds where even the bill is indorsed, it must hold *a fortiori* where the bill has not been indorsed, because in that case there could be no security granted and no conveyance made, and no act or deed done by Farquhar whatever, so as to bring it under the statute 1696. The receipt granted on 5th January obliging the appellant to return these bills was the strongest possible evidence that they were not indorsed; while the respondent, who undertook to prove this fact, has failed to prove it. The deposition, therefore, of the bill, with the appellant, without indorsement, gave him no security whatever. He could not recover the contents. It was subject to arrestment, and might have been carried off at the suit of a creditor. And the cases referred to, quoted by the respondent as deciding that bills so endorsed on the eve of bankruptcy, were within the spirit and intentment of the statute 1696, are quite inapplicable, and were decided on different grounds,—these being cases where no value was granted for the bills.

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*Pleaded for the Respondent.*—That the indorsation of a bill to a creditor, in order that he may thereby obtain his payment, is a deed done “for his satisfaction or further security,” and, consequently, falls within the meaning of the act 1696. That this was decided in the above quoted cases. The bill of £180 and the draught for £255 could not be indorsed in satisfaction and payment of the debt, because it was qualified by the receipt granted, which proves the transaction to be a security for a debt formerly contracted. It seems not seriously denied that the bill was indorsed by Farquhar to Angus. The latter merely contends, that as it was not indorsed by him when it went out

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Jan. 1713;  
Durward v.

 Wilson, 2 Jan.  
1700; Dal-

 rympie's Coll.  
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of his hands, then no properly completed indorsation took place; but this is perfectly immaterial, because it must be presumed to have been indorsed before going out of his hands, as a bill, without this, is ineffectually transferred. And even supposing no indorsation had taken place, it is clear that such a nexus was created upon the bills, tantamount to an indorsation, as put it out of the power of any person to attach or acquire them, until the appellant's debt was paid; and which also brings the transaction under the statute. Nor is it any answer to this to say, that the money which the appellant thus acquired in extinction of his debt was a ready money payment, because, according to the construction put upon this act, it is even a question how far actual payment in cash to one creditor in preference to the rest, on the eve of bankruptcy, is not within the operation of the statute. Undoubtedly the words of the statute strike against every such act and deed of the nature here resorted to, and if the statute were not made to apply to the circumstances of this case, then it might be eluded on every occasion.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Alex. Wight.*

For the Respondent, *Ja. Montgomery, Ar. Macdonald.*

M. Append. P. I. "Bankruptcy," No. 7.

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ANDREW WAUCHOPE, Esq.	- - -	<i>Appellant:</i>
SIR ARCHIBALD HOPE, Capt. JOHN M'DOW-	{	<i>Respondents.</i>
ALL, and JOHN WAUCHOPE, Esq.,		

House of Lords, 10th April 1774.

LEASE—ARBITRATION.—Construction of lease held entitling the landlord to shut up the level, communicated from his colliery to another, without his consent or remuneration. This dispute having been referred to arbitration, with power to issue orders as to the opening the level, until the question of right was determined, and this reference having fallen to the ground by expiry of the same; Held that any order of the arbiter to open the level acquiesced in by both parties during the subsistence of the submission, could not be the ground of a judgment, holding that the landlord could not shut up the level, as such a judgment was contrary to the judgment of the House of Lords in the same case finding the reverse; and also because the submission

founded on, had become an absolute nullity from the expiry of the same.

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This is the sequel of the case reported ante p. 286, regarding the import of certain leases of coal and the communication of the Duddingstone level to the adjacent collieries higher up, without consent or remuneration. The judgment of the Court of Session, holding that the level was to be communicated without consent or remuneration, was reversed in the House of Lords; and a remit *quoad ultra*, to the Court of Session to do therein as might appear agreeable to law and justice.

The appellant then petitioned the Court of Session, praying them to alter their former interlocutor of the 7th Feb. 1771, and in lieu thereof, to find and declare in terms of the House of Lords' judgment. Also, in consequence thereof, to find, that the appellant was at liberty forthwith to proceed to shutting up the level where it communicated from the lands of Niddrie into the lands of Edmondstone. 3dly. To ascertain what consideration ought to be paid him by the respondents Hope and M'Dowall for the benefit and advantage they had received in raising coal in the lands of Edmondstone and Woolmet, by means of the level, since it was first communicated to the lands of Edmonstone, and what they should receive from farther quantity of coal raised in those grounds, until the communication was effectually shut up: And further, to find the respondents Hope and M'Dowall bound and obliged to obtain from Lord Abercorn a perpetual communication of the Duddingstone level to the Niddrie level. A submission had been at first entered into, in which both parties empowered the arbiter to issue orders regarding the opening the level, until the question of right was determined. The arbiter ordered the level to be opened. But the submission fell to the ground by expiry thereof.

The Lords applied the House of Lords' judgment, but on the other points remitted to the Lord Ordinary, who ordered a full argument by informations, and reported the questions to the Court.

The Court, of this date, pronounced this interlocutor:— Dec. 9, 1773.  
“ In respect that the level from the lands of Niddrie was  
“ communicated into the lands of Edmonstone and Wool-  
“ met, by order of the arbiter chosen by the parties to de-  
“ termine the questions between them concerning said level,  
“ and which order the arbiter had power to pronounce,  
“ therefore, the Lords find that the pursuer, Andrew Wauchope

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" of Niddrie, during the subsistence of Sir Archibald Hope  
 " and Captain John M'Dowall, their rights and interests in the  
 " collieries of Edmonstone and Woolmet, in virtue of their  
 " present leases, is not entitled to shut up the foresaid level.  
 " But find that the said defenders, for any benefit which it  
 " shall appear they have enjoyed, or shall hereafter enjoy,  
 " by means of said communication, and for raising coals on  
 " the lands of Edmonstone and Woolmet, are liable to the  
 " pursuer in a recompense on that account: Further, the  
 " Lords find the said defenders, in consequence of the lease  
 " of Niddrie coal by the pursuer to John Biggar, liable to  
 " warrant a communication of the Duddingston level to the  
 " Niddrie coal, so long as their present right to the said Dud-  
 " dingston level shall subsist, but no longer; and remit to the  
 " Ordinary to proceed accordingly, and to hear parties on  
 " any other points of the cause, and do as he shall see  
 " just."

The appellant, conceiving that denying him the right of shutting up the level, during the continuance of the respondents' interest in the Edmonstone and Woolmet collieries, to be erroneous, and also that the latter part of the above interlocutor, which confines his right of even communicating the Duddingston level to the Niddrie coal, only so long as the continuance of the respondents' interest in the Duddingston level, but no longer, to be directly contrary to the import of John Biggar's contract of lease from the appellant, he thought it proper to bring the present appeal to the House of Lords against the above interlocutor.

*Pleaded for the Appellant.*—That the interlocutor of 7th February 1771 being reversed *in toto*, it necessarily follows that every point which it embraced is reversed also. That interlocutor declared, that John Biggar had a right by the lease to carry his level through the pursuer's lands, and to communicate the same to the coal of Woolmet, &c., and that the pursuer cannot shut up the level. These two propositions were reversed by the House of Lords, and the converse of them must therefore be established. The respondents' pretence, therefore, that this judgment was a mere decision on the import of the lease, without regard to the point now raised, or any other right the respondents might have of communicating the level. The lease expressly prohibited the communication of the level to any neighbouring lands without the appellant's consent. And the submission entered into having afterwards expired, and all the proceedings thereon become abortive, was not evidence of his con-

sent, and ought not to be founded on, as is done in this interlocutor, because the mere order of the arbiters to open the communication of the level could not affect the true legal construction of the lease itself; and, in particular, could not "hurt the interest or claim of the said Andrew 'Wauchope,' the arbiters having power only to issue such interim orders, always under condition of not hurting his interest, and only during the subsistence of the submission. Of course, when the submission expired, these powers, and all rights derived from their exercise, would cease and determine. The import of the lease was also the matter submitted to arbitration, which, on its failure, was determined in the House of Lords. On this event the arbiters' interim order became a nullity, and any judgment founded thereon must be erroneous. He is, therefore, entitled to shut up the level, and the same principle which entitles the appellant to do so, entitles him to have it done at the respondents' expense, as he has a clear right, after the judgment of the House of Lords, to have matters placed *in statu quo* before that order was issued. In regard to the endurance of his right, the appellant's lease to Biggar expressly binds the latter to procure from the Earl of Abercorn a consent to the communication of the Duddingston level to the Niddrie coal. His right so to be procured was, by the general words of the contract, plainly intended to be perpetual. That such was the meaning, is evident from the after covenants in the lease, whereby they settle the terms upon which that level might be communicated to other coals at any future time, which could not take effect, unless the appellant had a previously vested and perpetual right to the Duddingston level.

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*Pleaded by the Respondents.*—That the judgment of the House of Lords was only a judgment on the import of the lease, without regard to any other right the respondents might have of communicating the level to the lands of Edmonstone, independently of the lease. But as, subsequent to the lease, a submission was agreed to, with power to make such decrees and orders for carrying on the level, as he might think proper, and as the arbiter had ordered the communication of the level to the lands of Edmonstone, whereof the respondents had, independent of the lease, right to avail themselves, the respondents ought not to be deprived of the enjoyment of the level so communicated, nor can the appellee

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lant shut up the same, except by the consent of both parties. Besides, the new demand of the appellant for shutting up the level is inconsistent with the conclusions of his own libel or declaration in this very cause. As there he first concludes for a consideration for the benefit of the level in all time coming ; and it is only in the event of his failing to obtain such consideration, that the other conclusion for shutting up the level is added. In such circumstances, the only question that remained was, the recompense to be received, on the assumption that the level is to be allowed to remain open. The interlocutor appealed from is quite conformable to the judgment of the House of Lords, which was a mere *general* reversal, without establishing any thing specifically, leaving to the Court below to proceed further therein. The only point fixed by that decision was, that John Biggar had no right *by the lease* to communicate the level without the consent of the appellant; but such consent was already given, by empowering the arbiter in the submission to consent for him, whose order to open the communication of the level must be held as tantamount to that consent. And in regard to the perpetual communication of the Duddingston level contended for by the appellant, Biggar came under no obligation by the lease to procure Lord Abercorn's consent to such perpetual communication, and there is no expression therein which even implies such a right. He came under no warranty to that effect; and the appellant could never expect to obtain a better right than Biggar himself possessed.

After hearing counsel, it was

Ordered and adjudged that the appellant is entitled to have the level in question shut up by the respondents, and kept so shut up at their expense, and also that the respondents are liable to make the appellant such satisfaction as shall be just and reasonable, under all the circumstances, for the benefit they have enjoyed, if any, by reason of the opening and communication of the said level. And it is therefore hereby ordered and adjudged, that so much of the interlocutor complained of, as is contrary to the declaration above mentioned, be, and the same is hereby reversed. And as to that part of the said interlocutor which relates to the respondents' procuring the consent of the Earl of Abercorn to a communication of the Duddingston level to the Niddrie

coal, it is hereby further declared, that as the question materially turns upon the construction of the covenant entered into by the Earl of Abercorn in the lease granted by him to John Biggar, therefore complete justice cannot be done, but in a suit to which the said Earl is a party ; and it is therefore ordered and adjudged, that such part of the said interlocutor be, and the same is hereby reversed, without prejudice, and with liberty to the appellant to add proper parties to this ; or to bring a new suit, as he shall be advised. And it is further ordered, that the Court of Session in Scotland do give all proper and necessary directions for carrying this judgment into execution.

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**For Appellant,** *Al. Wedderburn, J. Dunning, John Mad-*  
*docks.*

**For Respondents,** *Ja. Montgomery, Al. Forrester, A.*  
*John Ord, Ar. Macdonald.*

**Note.—Unreported in Court of Session.**

(M. 15,523.)

**JOHN CARRE of Cavers,** - - - *Appellant;*  
**WILLIAM CAIRNS' WIDOW and CHILDREN,** *Respondents.*

House of Lords, 6th May 1774.

**LEASE UNDER ENTAIL.**—Construction of clause in a lease, which, by the entail of the estate, was only to be granted for the lifetime of the grantor, or for 15 years. Held good though granted for 19 years, and though the grantor died before that term expired.

The appellant's grandfather, John Carre, granted a lease of the farm of Softlaw, for 15 years, to William Cairns, the husband of Mrs. Cairns, and father of her children, respondents.

The estate was held under strict entail, and contained the following prohibitory clause :—“ That it shall not be lawful “ to the heirs of entail to sell, analzie, wadset, or dispone, “ redeemably or irredeemably, said lands, or any part there-“ of, or to grant infections of annualrent or liferent furth “ thereof, or to contract debts, or to do any other facts or

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"deeds, civil or criminal, whereupon said lands may be anywise evicted, adjudged, apprized." Then after the irritant and resolutive clauses, this clause occurred as to leases: "That notwithstanding of the irritant clause above mentioned, it shall be lawful to the said John Carre, and remanent heirs of entail, to set tacks of the lands, the same being only for the lifetime of the setter, or for 15 years."

William Cairns having, four years before the expiration of the above lease to him, applied for a new lease, to commence on expiry of the old, and having in view some improvements, he was desirous of obtaining the new lease for a term of 19 years. Accordingly, this new lease was granted him, bearing to be for the space of 19 years, provided the grantor lived so long, if not, according to the power of leasing in the entail. His entry being at Whitsunday 1758, to the houses, grass, and pasture, to the arable land at the separation of the crop. The warrandice in this lease was, "at all hands, and against all deadly, as law will; declaring, that in case the said John Carre shall happen to depart this life before the expiry of this tack, then the obligation of warrandice above written, shall not extend any further than what is consistent with the powers he hath by the entail of the said lands, with respect to granting tacks."

The appellant succeeded to the estate, upon the death of his father, who died before the expiry of the 19 years, and he, conceiving the above lease expired at the end of 15 years, in consequence brought an action of removing in the Sheriff Court, in which, after various procedure, he obtained decree of removing; but the respondents brought a suspension of this decree, contending, that as the entail contained no prohibitory clause against granting leases, and as there was an express permission to grant leases for the possessor's lifetime, the present lease for the space of nineteen years was not affected by the entail. It was answered, that the words of the entail respecting the granting of leases were clear, express, and unambiguous, declaring, that it should not be lawful to grant leases for a longer term than the life of the grantor, or for 15 years; and that, upon a sound construction of the lease granted, it cannot be sustained for a longer period than 15 years.

Jan. 19, 1774. The Lords, of this date, sustained the reasons of suspension, and suspended; and, upon reclaiming petition, they adhered.  
Feb. 22, —

Against these interlocutors the present appeal was brought to the House of Lords.

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*Pledged for the Appellant.*—The prohibition contained in the deed of entail, is clear and unambiguous, restraining the heirs of entail in possession, from granting leases for a longer term than 15 years, or during their own lives. The lease granted to William Cairns in 1754, bears for the space of 19 years, provided the granter lived so long; but, in the event of his death, the term allowed by the entail, 15 years, was to be the period of its endurance; and the granter having died before the expiry of the 19 years, the lease was thereby reduced to one for 15 years. The want of registration of the entail has no bearing on this question, because the tenant is bound, by the terms of the lease, whether the entail be recorded or not; and these having bound the tenant to remove, “in case John Carre shall happen to depart this life before the expiry of this tack,” in which case, the warrandice was to extend no further than what was consistent with the powers he held by the entail; and the granter having died within that period, the lease cannot exist for longer than 15 years.

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*Pledged for the Respondents.*—An entail, by the law of Scotland, is held to be *stricti juris*, and no limitation of the heir's right is to be inferred by implication.—In the present entail, there is no substantive prohibition against granting leases; and even though there was one supported by irritant and resolutive clauses; yet if the entail itself was not recorded, the prohibition would go for nothing, and the entailed be entitled to grant leases. The right by the lease must be ascertained by the leasing clause, and not by the warrandice clause, in order to ascertain the endurance and ish or expiry thereof. As, therefore, there is no limitation in the leasing clause, of the term of endurance, to less than 19 years, the respondent was entitled to possession for that term. Even on the assumption that the lease was reducible, for want of power of the granter to grant a lease for longer than his own life, that question could not be tried in a mere action of removing; and being a matter of heritable right, was not competent before the Sheriff, nor upon the Act of Sederunt; but the matter is now set at rest by the principles above contended for, supported as these are, by the homologation of the appellant, in receiving rent from the respondents, after their father's death, under the new lease.

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v.  
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After hearing counsel, it was  
 Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors therein complained of be affirmed,  
 with costs.

For Appellant, *Al. Wedderburn, Henry Dundas.*  
 For Respondents, *Ja. Montgomery, Alex. Murray.*

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Dr. JOHN ROEBUCK and SAMUEL GARRET, *Appellants;*  
 Messrs. WILLIAM and ANDREW STIRLING, *{ Respondents.*  
 Merchants in Glasgow, - - -

House of Lords, 27th May 1774.

PATENT—PREVIOUS USE.—A patent obtained for an invention in Scotland, is invalidated by proof of previous use in England.

This was a suspension and interdict brought by the appellants, owners of a patent obtained by them, for an invention for extracting spirit of vitriol from sulphur and saltpetre, in vessels of lead, and likewise, also for purifying the same, in vessels of lead, which was done by heating these over fire. The spirit was used among manufacturers for staining, printing, and bleaching linen, &c. They prayed to have the respondents, merchants in Glasgow, interdicted from using their invention, at their works in Glasgow. Long before the date of the patent, the appellants had been, at least for 20 years, in the private use of the invention, at their works in Prestonpans,—keeping it a secret from all, and enjoying a monopoly of the benefits which it conferred.

Originally the oil of vitriol was made from setting the sulphur on a fire; and hanging over the burning sulphur a bell or hollow vessel of glass, which condensed the fumes of the sulphur, and made the spirit or oil, trickle down the sides of the glass. Afterwards an improvement was effected, which had in view to prevent a large portion of the fumes from escaping into the open air, which took place by the above mode. This was by distilling the oil or spirits from calcined vitriol, in glass retorts, by means of a strong fire.

The late Dr. Ward effected a further improvement, so as to produce a saving in expense, and to admit of selling the article cheaper, which was by burning the sulphur in close vessels, by means of a mixture of saltpetre, by which the

whole fumes of the sulphur, being prevented from evaporating, were condensed, and became oil or spirit of vitriol. The only vessels used by Dr. Ward were made of glass ; and the next improvement made was that of the appellant, Dr. Roebuck, who alleged in the suspension, that after considerable expense, and making many experiments, the suspenders at last discovered, that oil or spirit of vitriol might be prepared, by burning sulphur in close vessels *made of lead*, and that the same might also be rectified or concentrated in vessels of *lead*.

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The bill was passed to try the question ; and interdict *ad interim* granted.

Before the Lord Ordinary, (Lord Justice Clerk), the respondents contended that the appellants' patent was bad :—1st, Because the substitution of *lead*, in place of *glass vessels*, was no new discovery, being only a small variation *in the method of conducting the manufacture*: 2d, That it could be no new discovery at the time of granting the patent, because the appellants had carried on the manufacture in that method for 20 years preceding that period: 3dly, That at the time the patent was granted, this method of manufacturing oil, or spirit of vitriol, in vessels of lead, was known to, and practised by various other people, both in England and Scotland. It was answered, 1st, That where a *new mode* of carrying on a manufacture, beneficial for the public, is discovered, the Crown may effectually grant an exclusive privilege to the inventor of that *new mode*, leaving the other known modes of carrying on that manufacture free to every other person. 2d, That they had of course taken a long time to mature their discovery,—they had been at great expense in making experiments, and were in exclusive possession, for several years prior to the patent, of the invention, which, in so far as was in their power, they kept secret. 3d, And they denied that their invention was known, and in public use, either in Scotland or England, and that no prior use, by mere private or clandestine operations, on principles similar to the appellants, nor private experiments, will be effectual to invalidate their patent, as it was incumbent on the respondents to prove a public *exercise and use* prior thereto.

The Lord Ordinary, of this date, having ordered a proof Mar. 10, 1773. of the prior use, *prout de jure*, and proof being led accordingly, it was proved that one of the respondents had had the appellants' invention communicated to him by one of

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their own workmen.—They also proved, that it was previously known, and in use in England. Some other witnesses employed in works at Battersea, Bewdley, in England, and Mr. Steel and his brother, who carried on a manufactory near Edinburgh, refused to appear to give their evidence, stating that they carried on their work by a secret process, and refused to give evidence as to their mode of manufacture. But while there was pretty clear evidence of its having been previously known and practised in England, there was no such proof of previous use in Scotland. The only person who had known and practised the invention in Scotland was Mr. Steel and his brother, and this was only commenced, not before, but long subsequent to the date of the patent; so that a question arose upon the effect of the proof, Whether, though the invention was proved to have been practised in a foreign country, viewing England as such, proof of previous use there could invalidate a Scotch patent, the privilege of which extended, as the patent bore, “Quod ejus publicum in illa parte dict. regni nostri Magnæ Britanniaæ Scotia vocat. usum et exercitum non esse novam inventionem,” &c., and therefore only to Scotland? It was observed, that it was common, in an English patent, passing under the Great Seal of England, to apply and get the patent extended to Scotland, thereby showing that an English patent passing under the Great Seal of England, could not extend to Scotland. But, in answer to this, it was argued, that, by the treaty of Union, all parts of the United Kingdom were placed under the same privileges and restraints in regard to such matters of right and trade, and, therefore, that previous use in England was sufficient to invalidate a patent in Scotland, even though that patent only extended to Scotland.

Mar. 10, 1774. The Court, of this date, pronounced this interlocutor:—  
 “On the report of the Lord Justice-Clerk, find, in respect  
 “it appears from the proof adduced, that the art of making  
 “oil of vitriol from a mixture of sulphur and saltpetre in  
 “vessels of lead, was at the time, and before the date of  
 “the letters patent in favour of the appellants, known to,  
 “and actually practised by different persons in England;  
 “therefore the Lords find the letters orderly proceeded,  
 “and decerns.” Thus refusing the interdict (injunction).

Against this interlocutor, together with the preceding interlocutors, the present appeal was brought.

*Pleaded for the Appellants.*—Every original discoverer of an invention, or an importer of a foreign invention, useful to the public, may obtain a patent for such invention. The appellants are the discoverers and inventors of the present invention, which, after great labour, time, and expenso bestowed on their part, they have made useful to the public and reduced the former expense of the oil of vitriol some 30 per cent. They at first kept it a secret, but finding that they were likely to be deprived of the benefit of the discovery, by the unlawful and clandestine attempts of others in obtaining a knowledge of it, they applied for, and obtained a patent, whereby they are entitled to the exclusive right of exercising it for the term allowed. Nor is it any answer to this to say, that the appellants' invention is not an original invention, but only an improvement on an invention formerly in use, because the act 21 James VI. § 6, gives the benefit to a new method, a process not formerly in use, and which in its results lowers the price of the commodity below that formerly in use. Nor does it invalidate their patent, that, at the date of the patent, the same method was practised by the appellants themselves, as well as by others in England and Scotland; because they were, during the course of these years in which they kept it secret, only maturing their invention, and bringing it into completion. And, so soon as it attained this perfection, they disclosed it to the public, and obtained a patent therefor. They are, therefore, entitled to protection in that right, so long as no proof has been brought, either of previous discovery or use in Scotland. The evidence, slender and imperfect as that is, of previous use in England, will not affect the patent, because England must be viewed as a foreign country in respect to Scotland, and, in that view, the appellants are entitled to the full benefit of the patent, even though they had not been the first discoverers, but only the first importers of an invention. Seeing, therefore, that they were the original inventors of this improvement, by which an article of manufacture was cheapened 30 per cent., and also seeing that no proof exists of prior use in Scotland, but only proof *there*, of a use subsequent to the date of the patent; and looking also to the facts led in evidence, that the use of it in England is traced to a knowledge surreptitiously obtained through the medium of one of their workers, who left the works and went to England, the previous use in that country ought not to invalidate the patent.

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*Pleaded by the Respondents.*—The validity of every patent depends upon the circumstances in which it has been obtained. A patent, obtained on the allegation that the applicant is the original inventor, will not be good, if it turns out that he is not so, and all patents obtained by disguising, suppressing, or concealing the truth, will, in like manner, be ineffectual. Accordingly, this is precisely the circumstance in which the case stands, because the appellants' petition induces the belief that his invention is a new manufacture, then for the first time discovered. It did not disclose the fact, that Dr. Ward had obtained a patent for his invention, nor that *they themselves*, and others in England, had carried on that invention, under the cover of these leaden vessels. All this was concealed; and they apply for their patent, on the representation that the invention was new, and that it was their invention. But, as the change of the mere material of the vessel could not entitle it to the character of a new invention, it was necessary to disclose that the invention was not new—that another patent existed—and to shew what part of this invention was the appellants'; instead of this, he states, that, so far as he “knows or believes, the same has not been discovered or used by any person or persons, except by him and his partner, and by their agents or servants.” Leaden vessels had been used in England long prior to the date of the patent; whereas the claim supposes them to be the original inventors, which they have not proved themselves to be. It also supposes the invention to be difficult, but an invention cannot be difficult that is already known and in use; and the mere change of the *vessel* from *glass* to *lead*, in which the sulphur was heated, did not suppose any difficulty, but such as might suggest itself to every one. Accordingly, oil of vitriol was in use to be made in leaden vessels in England long prior to the date of the patent, as well as in practice in Scotland by the appellants and others, all which was proved or admitted.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained against be affirmed.

For the Appellants, *E. Thurlow, Ja. Montgomery, Al. Wedderburn.*

For the Respondents, *Al. Forrester, Alex. Murray.*

Unreported in the Court of Session.

Messrs. DOUGLASS, HERON & Co. The Honourable JOHN GRANT, Esq., one of the Barons of the Court of Exchequer in Scotland, - - -	<i>Appellants;</i> <i>Respondent.</i> <hr/> DOUGLAS, &c. v. GRANT.
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House of Lords, 1st June 1774.

**GUARANTEE—RECAL—DELIVERY.**—A guarantee for a certain party, a partner in a firm, held not to operate as a guarantee for this firm ; and though the guarantee was handed over by the obligant, to be sent to the parties requiring it ; held, that the bankruptcy of the party, for whose benefit it was granted, before reaching their hands, entitled the obligant to recal his guarantee.

The appellants carried on business as bankers in Ayr, Edinburgh, and Dumfries ; Alexander Ferguson of Cragdarrock, a director of the said company, had been sent to London, to manage the affairs of the company there, in the springs of 1771 and 1772.

On the first occasion, he had been introduced to Mr. Fordyce, of a firm which carried on business as merchants and dealers in bills of exchange, under the title of Fordyce, Grant, and Company, in London, and Fordyce, Malcolm, and Company, in Edinburgh, both of which houses were one concern.—Fordyce, at that time, contemplated retiring from his concern, and was anxious, sometime before doing so, to establish his other partner, and brother-in-law, Andrew Grant, in good credit, before he separated, so that he might be able to carry on the concern. With that view, he consulted Mr. Ferguson as to the mode in which this could be best effected, whereupon the latter not only recommended the establishing of credits in favour of Andrew Grant, but assisted in obtaining them, by introducing Mr. Fordyce to two several banking houses in London, where credits were procured for Andrew Grant, guaranteed in part by John Fordyce, and in part by the respondent, who was a brother of Andrew Grant. But the separation not having taking place, nothing followed upon these.

In March 1772, Alexander Ferguson was again sent to London by the appellants' firm, to establish accounts for them there, with different houses.—On this occasion several interviews took place between him and Andrew Grant, still with the view of establishing his credit after the dissolution, by the retiring of Fordyce, which was to take place in June or July following. The result was, that out of friendship to

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Andrew Grant, Mr. Ferguson agreed to employ him as one of the appellants' correspondents in London. Whereupon

**DOUGLAS, &c.** Andrew Grant wrote, "What I understand to be the terms  
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**GRANT.** " agreed on between us for Messrs. Douglas, Heron, and

April 20, 1772. " Company, commencing an account with *my* house in London, which please confirm in reply to this:—1st, That " Messrs. Douglas, Heron, and Company, shall have liberty " to draw upon *my* house in London, for what sums and at " what dates they think proper, or order them to pay away " money to any other correspondents. 2dly, That for all " bills drawn at or under the rate of ten days, Messrs. " Douglas, Heron, and Company shall, by the same post, remit bills on their bankers, or other bills on bankers in " London, sufficient for the payment of these bills. 3dly, " That for all bills drawn above the rate of ten days, they " shall remit bills on bankers as above, to be in the hands " of the house in London, at least ten days before their bills " became due. 4thly, That they shall give no order to pay " away any money sooner than five days after the house in " London shall receive the order; and the same post that " brings such order, shall bring remittances, in bankers bills, " for the same. 5thly, Douglas, Heron, and Company, shall " constantly keep in the hands of *my* house £6000 sterling, " which on no consideration shall ever be reduced, and for " which they are to be allowed no interest, in consideration " of which no commission was to be charged."—The answer

April 20, 1772. to this letter from Mr. Ferguson simply stated:—"I am " clearly of opinion, the terms you propose to conduct the " above account for Douglas, Heron, and Company, are very " reasonable, and agree to the same on their parts, which I " have no doubt will meet with their approbation. And I " am, &c.

On submitting this agreement to the directors, on his return to Edinburgh, they, at their meeting, held on 7th May, approved of the agreement, but as a heavy deposit of £6000 was to lie in the hands of Mr. Grant, the company insisted on a guarantee. Accordingly, on the same day, Mr. Alexander Ferguson wrote the following letter to Mr. Andrew Grant: "As we are acting for a number of other people, and, " consequently, must be more scrupulous in our transactions " than if they were on our own account, we hope you will not " look upon it in the least disrespectful to your house, that " we request of you, at your convenience, to transmit us a " letter of guarantee from one or two of your friends, for

"your transactions with Douglas, Heron, and Company," 1774.  
 &c.

In compliance with this request, the respondent, a brother of Mr. Andrew Grant, became guarantee for his brother, in the following letter :—“ As I learn from my brother, that June 4, 1772. he has entered into an agreement with Douglas, Heron, and Company, by which £6000 of their money is to lie in his hand, I hereby become security for him to these gentlemen for this sum, and oblige myself that he shall repay it to them, according to the terms of his agreement.” This letter of guarantee was sent by Andrew Grant to his partner in Edinburgh, John Fordyce, with this letter : “ Enclosed is the Baron’s letter of guarantee, to D. H. & Co. I send it to you for your approbation ; you can, if you approve, make K—g deliver it.”

The appellants alleged, that they and their partner, who negotiated the transaction, all along understood that this was a transaction concluded with Messrs. Fordyce, Grant, and Company, and accordingly, by letter of this date, ad- May 8, 1772. dressed to “ Messrs. Fordyce, Grant and Company,” they state,—“ Gentlemen, in consequence of our Mr. Alexander Ferguson’s letter to your Mr. Andrew Grant, by last night’s post, I have this day drawn on you for account of Messrs. Douglas, Heron, and Company, viz. £700 and £800 to David Thomson, at seventy days date,—£900 and £600 to James Mayleston, seventy-five ditto,—£1000 ditto, eighty ditto,—£4000 to your credit, I am, &c.” They also stated, that this was also the understanding of Mr. Andrew Grant himself, because, when they wrote, sending the other £2000 to Fordyce, Grant, and Company, of this date, in which the appellants state, “ this completes the May 30, 1772. £6000 deposit,”—this letter was regularly answered by a letter written by Mr. Andrew Grant, and signed with the firm of Fordyce, Grant, and Company, in which there is the June 4, 1772. expression, “ this completes the amount of deposit, in terms of our agreement.”

It was on this very date that the above letter of guarantee was signed by the respondents, and transmitted to Mr. Fordyce, Mr. Andrew Grant’s partner in Edinburgh. On its arrival, Mr. Fordyce was in the country, and the letter did not reach him until the 22d June. In the meantime, Alexander Fordyce, banker in London, stopped payment and absconded ; and Fordyce, Grant, and Company being deeply

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connected with him, were obliged to stop payment the next day.

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The accounts of these failures reached Edinburgh before the above letter of guarantee reached Fordyce's hands.—The letter, when it did reach him, in order not to prejudice the rights of parties, in the then posture of affairs, was placed by him in the hands of a neutral friend. Action was then raised by Douglas, Heron, and Company, against the respondent and Fordyce, Grant, and Company, for payment of the £6000 so deposited; and also another action was raised by the respondent, against this neutral party, for delivery over to him of the letter of guarantee. These actions being conjoined, the Lord Ordinary ordered the declarations of Alexander Ferguson, John Fordyce, and others, to be taken in regard to the whole transaction, from which it appeared, that the facts above set forth were confirmed. The Lord Ordinary thereupon made avizandum to the Court, with the mutual memorials ordered by him. The defences stated by the respondent were, 1st, That his letter of guarantee had no relation to any transaction with Fordyce, Grant, and Company, or to any sum of money deposited with that house; but to a transaction with Mr. Andrew Grant alone, who was to carry on business by himself, upon the dissolution of the copartnership of Fordyce, Grant, and Company. And, 2d, That the letter was never delivered to Douglas, Heron, and Company, and no action could arise upon it: because he never came under any previous obligation to grant it, he could not be compelled to grant the same. And if he could not be compelled to grant the same, he might, on the same principle, refuse to deliver it while so undelivered. This the more especially in a voluntary and gratuitous act, undertaken for another, which was revokable in its nature, at any time by him; and which, if ever delivered into the hands of Douglas, Heron, and Company, he might have cancelled or demanded it up from them at any time.

Feb. 24, 1774. The Court, of this date, pronounced this interlocutor,  
 " sustain the defences for Baron Grant; assoilzie him from  
 " the action at the instance of Douglas, Heron, and Com-  
 " pany, and decern."

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—1st, That the respondent's letter of guarantee applied, in the most direct manner, to the transaction that really took place. That it was written the very day on which Mr. Andrew Grant, under the firm

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of Fordyce, Grant, and Company, acknowledged the deposit of £6000 to be complete. It even refers to this sum, as a sum agreed on, to lie in his brother's hands, and states, that he has been informed, that such sum has been deposited, so that in no rational view can he maintain, that this deposit in his brother's hands, was otherwise than as active manager of the firm of Fordyce, Grant, and Company. It was quite immaterial to this question, that at the time the transaction was gone into, a dissolution of the firm of Fordyce, Grant, and Company, was in contemplation ; because, while that final step was not taken, any arrangement with Grant, in the proper course of his own business, of which he was a partner in Fordyce, Grant, and Company, must be presumed to have been a company transaction. And the letter written, acknowledging receipt of the £6000, written by Andrew Grant, was signed by Fordyce, Grant, and Company, while all the letters sending the remittances of this sum, were addressed to that firm. As, therefore, the agreement has not been proved to be one entered into by Mr. Andrew Grant, for, and on behalf of himself only, but, on the contrary, for, and on behalf of the firm of Fordyce, Grant, and Company, the appellants are entitled to action on the respondent's guarantee, for the recovery of the amount. The letter of agreement, signed by Andrew Grant, of 20th April 1772, was subject to approval of Mr. Alexander Ferguson's constituents, the other directors of Douglas, Heron, and Company. It was laid before the first meeting for their approval, and approved of, on condition of finding a guarantee, and Mr. Grant having agreed to this, the agreement became a part of, and incorporated with, the above letter. And the remittances sent in terms thereof, to Messrs. Fordyce, Grant, and Company, and Mr. Grant's acknowledging the same, not in his own name, but in the name of his firm, Fordyce, Grant, and Company, were proofs of the transaction being with the latter, and not with Mr. Andrew Grant as an individual, such as places the matter beyond all manner of doubt. 2d, In regard to the delivery of the letter—a letter of guarantee so signed, and put into the hands of Andrew Grant for transmission, ought to be held in law as delivered the moment it has passed out of the hands of the obligant, into those who are to reap its benefit, more especially, as it was actually sent by Andrew Grant to his partner John Fordyce, for the purpose of delivery, and, on the faith of this being delivered, the appellants had remitted to Fordyce, Grant,

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and Company, the £6000 of deposit. No doubt this letter was not to be delivered, unless Mr. Fordyce *approved*, but this does not prejudice the appellants' right. On the contrary, it rather proves that the transaction was truly a transaction with Fordyce, Grant, and Company; or otherwise, why was Mr. John Fordyce's approval required, or necessary, except on the supposition that he was a partner in the transaction? The moment the letter of guarantee left the hands of the respondent, and was placed in the hands of Mr. Andrew Grant, it was a delivered document. It was placed there, just as an article would be with a carrier, for the special purpose of delivery to the person for whom it was intended, and to whom it was addressed; and the moment it was put into Grant's hands to be sent to the appellants, the document, in law, must be held as delivered, for, from that moment, he became liable upon it. It was constructive delivery, Mr. Andrew Grant being the mere trustee, custodian, or holder of the letter, for the benefit of the appellants. In the same manner, when it reached Mr. John Fordyce in Edinburgh, it was in his hands, for the special purpose of carriage and delivery to the appellants, and it was handed over by the latter to Mr. Dundas, the neutral party, subject to their demand and right for delivery.

*Pleaded for the Respondent.*—1st, The expression in the original letter of agreement, of "my house,"—the fact of Andrew Grant signing that letter alone, without any allusion whatever to any other firm or party, and, in particular, without any reference to the firm of Fordyce, Grant, and Company—coupled with the circumstance, that it was made with special reference to Grant's situation, after the dissolution of the partnership, of which he was a partner, were incontestable evidence that the transaction was one with Andrew Grant alone. The subsequent shape which the transaction assumed, after the letter of agreement of 20th April, did not, and could not alter the nature of that agreement. It only superadded the condition of guarantee, when it was submitted to the directors. This was agreed to by Mr. Andrew Grant. No doubt the appellants remitted the £6000 to Messrs. Fordyce, Grant, and Company; but this they were never required to do; and most assuredly, they never required Mr. Andrew Grant to obtain a guarantee for Fordyce, Grant, and Company, but only a guarantee for himself. This, accordingly, he agreed to do, and obtained and forwarded it to Edinburgh. But as that letter is not a guarantee for

Fordyce, Grant, and Company, but only for Andrew Grant, 1774.  
it cannot in law be extended to cover any transactions between the appellants and the firm of Fordyce, Grant, and Company. The £6000, therefore, having been remitted to, and deposited with this firm, no action lies upon the guarantee, because, in fact, no advance ever took place under it. In law, guarantees are strictly interpreted.—A letter of guarantee to an individual of a firm, will not be a guarantee to the firm. It is strictly applicable to the person, and to the particular transaction, and is never extended beyond either; but here the appellants wish to import a construction upon it, contrary to the express words of the letter, and contrary to every rule which has hitherto governed the construction of guarantees. 2d, In regard to the letter itself, it was never delivered to the appellants, either in fact, or in constriction of law. The respondent merely delivered it to his brother, until such time as the dissolution of the firm of Fordyce, Grant, and Company should take place. His brother, in this respect, became his agent or mandatory, and his transmitting this letter to Mr. Fordyce was, at most, but a delegation of that agency: but this power to deliver so imposed, he could recal at any time. He did recal it, by commissioning and sending another agent to demand the letter back from Mr. John Fordyce, when it arrived at Edinburgh; which was done prior to his recovering that letter, and which recal of power to deliver foreclosed him, when that letter arrived, from delivering it to the appellants. In point of fact, it was never so delivered to them. Nor is there evidence that this letter of guarantee was the one alluded to in Alexander Ferguson's letter of 7th May. He there demands a guarantee, but it seems rather to be a guarantee for the whole transaction, which, by the agreement, was to amount to £450,000 per annum, and not for the £6000 of deposit, so that, in every view of the case, the action under this guarantee against the respondent is untenable.

After hearing counsel, it was

Ordered and adjudged, that the interlocutor complained of be affirmed.

For Appellants, *E. Thurlow, Alex. Wight.*

For Respondents, *Ja. Montgomery, Al. Wedderburn.*

Not reported in Court of Session.

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(M. 14,272.)

DUKE OF ROXBURGH, &c. JOHN DUKE OF ROXBURGH, THOMAS LILLIE,  
 v.  
 EARL OF HOME, &c. Lessee of his Grace's Fishings in the River Tweed at Kelso, and WILLIAM MITCHELL, Lessee of the Fishings in the said river at Mackerstoun,

*Appellants;*

ALEXANDER EARL OF HOME and WILLIAM TURNER, Lessee of his Lordship's Mill and Fishings in the River Tweed at Fairburn, and CHARLES EARL OF TANKERVILLE, and DAVID ERSKINE, Clerk to the Signet, his Attorney, - - - - -

*Respondents.*

House of Lords, 6th June 1774.

**SALMON FISHING—ACT 1696—JURISDICTION.**—Held that the Scotch act 1696, against illegal modes of fishing, applied to the salmon fishing on the river Tweed, reversing the judgment of the Court of Session. Question: When a great river divides two kingdoms, Are there any real dividing line in the stream, which determines the rights of fishing, or is the whole river common to the proprietors on the English and Scotch sides; and how far are these rights of fishing subject to the Scotch statutes and jurisdiction of the Court of Session?

The act 1696, of the Scottish Parliament, regulates the fishings of salmon in Scotland, and, in particular, enacts laws relating to the killing of salmon, and black fish in forbidden time, and the killing the smolt or fry. It also provides, “in respect that the salmon fishing was much prejudged by the height of mill-dams that were carried through the rivers where salmon were taken, his Majesty, with consent of the estates of Parliament, ordained a constant slop in the mid stream of each mill-dam; and if the dyke were settled in several grains of the river, that there should be a slop in each grain (except in such rivers, where crives were settled), and that the said slop should be as big as conveniently could be allowed; providing always the said slope prejudice not the going of the mills situated upon any such rivers;—And his Majesty, with consent foresaid, discharged all fishing at such mill-dam dykes, with nets, stented or otherwise, or any other engines whatsoever, under the pains inflicted by that and

"former acts against killers of black fish, and destroyers of  
"the fry of salmon."

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On the river Tweed, about four miles below Kelso, the respondent, the Earl of Tankerville, owns the lands and castle of Wark, situated on the south side of that river; and the Earl of Home owns the lands and mill of Fairburn, on the opposite, or north side, both having a right to the fishings in the river opposite to their respective lands. At this part of the river Tweed there is, and has been for time immemorial, a cauld or dam dyke erected and standing in the said river, beginning very near the south side, and stretching quite across to the north side, consequently, is partly upon English and partly upon Scotch ground, and was originally intended for the purpose of conducting the necessary quantity of water to Fairburn mill.

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This dam dyke is of peculiar construction, being six feet high, and quite perpendicular on the lower side, so that it is perfectly impossible for any salmon to get over it, unless in a very high flood. But, to remedy this, and at sametime to give more vent to the superfluous water, there have been, from the beginning, five holes, apertures, or openings, two in the English, and three in the Scotch side of the said dyke, which are placed in the middle altitude thereof, and are about a foot and a half wide each.

These holes, it was alleged, had been for many years past illegally perverted to the purpose of destroying salmon, by the respondents' tenants. This was effected by placing at each hole a pock net, fixed on the upper side, with the mouth downwards, taking in the whole of the opening, and the tail of it stretched up the river fastened by a stone;—on the lower side there was a square barricade or pinfold of stones, with an opening on each side, to allow the salmon to pass in; upon each of these openings in the pinfolds were fixed, stented, or framed nets, that fall down within two or three inches of the bottom of the river, and the mouth of them towards the inside of the pinfold. When salmon came up the river, they passed easily into the pinfolds under these nets, which rose up to give them way. If they attempted to go up and run through the openings of the dyke, they ran into the pock nets; and if any of them happened to turn back, they were infallibly caught in the framed net.

The Duke of Roxburgh is proprietor of the fishings in

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that river lying above Fairburn mill-dam, and had them let on lease to tenants, who are the other appellants.

Action was brought by these tenants, Lillie and Mitchell, against Turnet, the Earl of Home's tenant, before the sheriff, complaining of these fishings, as being illegal under the act 1696; in which the sheriff, after hearing a proof, held

that the fishings were illegal, and decerned to have them removed forthwith. An advocation was brought of this judgment, at which stage the Duke of Roxburgh appeared as a party. The Lord Ordinary having repelled the reasons of advocation, remitted the case simpliciter to the sheriff. In the proof before the sheriff it was established, that the above engines, or pock nets, were set and kept in the water, on Sundays as well as on other days. That the said Earl of Home sometimes pulled out, or cut these nets. That stent-ed nets had been used at the dam dyke for about five years only. That it was usual for the fishers, when they took out their nets, to stop up the holes or apertures in the dam dyke, when it was not necessary to the going of the mill, to prevent the fish from going up the river. The sheriff again pronounced a special interlocutor, adhering to his former interlocutor, prohibiting and discharging the defenders for

the future to use nets, pinfolds, or other engines, and appointing such to be removed. In terms of these interlocutors, and after intimation thereof to them, a sheriff's officer went, in presence of witnesses, and removed all the net and other engines, and made an opening in the dam dyke of about 6½ feet wide, but these were immediately replaced, and the respondents brought a suspension and also a declarator and reduction. The Lord Ordinary turned the decret charged on into a libel, and conjoined the two processes, and "found

" that the nets and other engines for taking of fish, placed " in the dam dyke of Fairburn mill, and complained of by " the original libel, are contrary to law, and that the Earl " of Home, and Wm. Turnet his tenant, defender in the ori- " ginal process, are not entitled to use the same in the said " dam dyke; and therefore ordained the said defenders to " remove the said nets and engines betwixt and the first of " March next; and prohibited and discharged them from " placing or using them in the said dyke in time coming. " And further found, That the said defenders are bound to " make and keep open the three holes in the dam dyke de- " scribed in the libel betwixt the middle of the river and

"the north bank thereof, and ordained them so to do be- 1774.  
 "twixt and the said first day of March next. And in case  
 "the defenders should not remove the said nets and en- DUKE OF  
 "gines, and redd and make open the said three holes, be- ROXBURGH, &c.  
 "twixt and the foresaid day, authorized the Duke of Rox- v.  
 "burgh and his tenants, the original pursuers, to remove EARL OF HOME,  
 "the said nets and engines, and to red and make open the &c.  
 "said three holes upon the defenders' expenses. But in  
 "respect it appears from the proof that the defenders had  
 "been in possession for many years past, without legal  
 "challenge of the method of fishing complained of, assoil-  
 "zied them from the penalties and damages, and assoilzied  
 "the Duke of Roxburgh, and the original pursuers, from  
 "the reduction and declarator, and decerned. Found no  
 "expenses due to either party." On representations, the  
 Lord Ordinary reported the case to the Court, who found July 22, 1767.  
 that the act 1696 applied to and comprehended the fishings  
 on the river Tweed. But afterwards, and on further argu- July 25, —  
 ment, they pronounced this interlocutor: "Found and or-  
 "dained the defenders to remove the nets and engines, and  
 "appointed the three holes in the dam dyke, betwixt the  
 "middle of the river and the north bank thereof to be kept  
 "open."

The respondents reclaimed, and at this stage the Earl of Tankerville was admitted a party in the cause, who contended that the Scotch act 1696, or Scotch laws could not extend to the English side of the river.

The Court then "Found, in the special circumstances of this case, the act of Parliament 1696 does not extend to July 27, 1768.  
 "the fishing in question, and remitted to the Lord Ordinary  
 "to proceed accordingly."

On reclaiming petition the Court adhered, and the Lord Ordinary pronounced an interlocutor, in terms of the remit made to him, suspending the letters and reducing the decree of the sheriff. Nov. 25, —

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—That the act 1696 is general, and extends to every dam dyke belonging to any mill in Scotland. It is against the unlawful use of this dam dyke that the appellant complains, and the Scotch act refers. It applies to the Fairburn mill, which is on the Scotch, or north side of the river Tweed, and is owned by a Scotch subject; and consequently the regulations of this

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act must govern that dam dyke, and exclude all manner of fishing there inconsistent therewith. When a river divides the estates of two proprietors, each has a right to the salmon fishing opposite to his lands, from his own bank to the middle of the stream. In like manner, when a river, like the Tweed, divides two kingdoms, the same rule must govern. If an island is formed in the river, on either side of that middle line, it belongs entirely to the landowner on that side of the river; and if it is formed on both sides of the line, each of the landowners has a share of it. In like manner, if a river changes its course, and leaves the channel dry, that channel falls to be divided in the middle between the two opposite landowners; which doctrine is established by § 22. 23. Just. de adquir. rer. dom. L. 7. § 3. 4. 5. et L. 56. § 1. Feod. tit. To the same effect Grotius de Jure Belli et Pacis, gives his opinion, Lib. secundo, cap. tertio, § 16. 17. et 18. And Voet, in his Commentary ad titulum primum, lib. 41. Pand. § 17. 18. &c., and many other authorities might be quoted, if necessary. The contrary doctrine, that the right of salmon fishing of a proprietor on the banks of a river extends to the opposite bank, would lead to many dilemmas. In the present case, such a view is out of the question, because it necessarily follows, if the *whole* river were to be held the legal boundary between the two kingdoms, that it would be impossible to say, whether that river was within the dominions of the one kingdom or the other, or when the statutes of the one kingdom were to apply and when excluded, or the jurisdiction, whether Scotch or English, that was to be applied or had recourse to in the settlement of disputed rights on the river: Hence, therefore, the apparent expediency and absolute necessity of a line precisely dividing the rights and property of the subjects of the one kingdom from those of the other. The boundary on the river Tweed between England and Scotland is, and always has been, a line drawn along the middle of the river. Whatever happens on the south side of that line must be governed by the laws of England; and whatever is done on the north side of that line must be regulated by the laws of Scotland. The dam dyke in question is a dam dyke which is built from the north side of the river Tweed to the south, though not entirely across to the south bank. Like all dam dykes on the Tweed, it is built on the north side. This dam dyke, therefore, from the north side, to the middle of the

river, is undoubtedly within the territory of Scotland, and, consequently, must be subject to the jurisdiction of the Court of Session; and as the judgments complained of affect that part of the dam dyke only, the Earl of Tankerville, who has no right to that side of the stream, can have no right to quarrel these judgments. No illegal practice of fishing can be founded on. If the respondent's tenants had been in the practice of fishing in this manner, it was introduced by gradual encroachment, and in violation of the act. And it appears from the Earl of Home's lease to Turnet, that fishing with pock nets was only *sometimes* resorted to, but afterwards, by a combination between the tenants of the Earls of Home and Tankerville, in order to make their fishings more valuable, the right had been abused. But this illegal possession cannot be founded on by these Lords, in order to establish a practice of so fishing, which was objected to by the late Earl of Home, and no agreement between them, to hold the fishings in common, can alter the question in the eye of law, because each has granted to his own tenant, by distinct leases, unconsented to by the other, the fishings on his own side of the river. Therefore, and as the dam dyke must be viewed as erected for the use of Fairburn mill, which is on the Scotch side, all illegal use of that dam dyke, in its whole length, though extended beyond the middle of the river, is expressly prohibited by the statute, and the Earl of Home cannot screen himself from the consequences, by any agreement or combination with the Earl of Tankerville, who pleads that he is not subject to the laws of Scotland.

*Pleaded for the Respondents.*—The idea of a middle line as a boundary between two rights of property, placed in the middle of the stream of a river, is fanciful and illusory. It is especially so in a great river, which divides two kingdoms, the invariable rule in regard to which, being, that the river is common to both kingdoms, and is the property of the subjects in both states, on each side. The river that divides two kingdoms, as Grotius has it, is the right of neither exclusively, but is common to both. In the civil law, rivers were held to be *res publicæ*, the use of which was common to all. The act 1696, which is silent as to the river Tweed, and imposes regulations only for Scotland, can never be construed to apply to property held in *common* by the subjects of both kingdoms. And, supposing no common property existed, but that the idea of a middle line was correct,

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yet the constant uninterrupted possession here, by both parties, of the fishing over the whole dam dyke, without division, has established in both a common right of property, *pro indiviso*, by which each may fish to the opposite bank. It follows from this, that the river being a common right to both kingdoms, no judgment of the Court of Session in Scotland, could affect the right or interest of the Earl of Tankerville, a subject of England, and no order or decree pronounced there, to new model, or alter this dam dyke at Fairburn Mill, so as materially to prejudice the Earl of Tankerville's fishing in the river, could therefore affect him. The act 1696, consequently, cannot be held to apply to English rights of fishing, or to fishings on the river Tweed, held in common by English and Scotch landowners; but only to the fishings on rivers in Scotland otherwise situated. That the exceptions of the river Tweed, in several statutes regulating the fishing in Scotland, shows this, particularly in 1429, and the act 15th James VI. The exception is again repeated in 11th Act Parliament 16th James VI. After the accession of James to the Crown of England, an act passed in the Parliament of Scotland, which declares the reasons of the above exceptions to have been, "Because the said rivers, "at that time, divided at many parts the bounds of Scotland and England adjacent to them, whereby the forbearance, upon the Scots part, of the slaughter of salmon, in forbidden time, and of kipper smolts, and black fish at all times, would not have made the salmon any more to abound in these waters, if the like order had not been observed upon the English side, which impediment being now removed, by the happy uniting of the two kingdoms in an empire, retreats, and perpetually annuls and abrogates the said exception, of the said waters of Tweed and Annan," which shews that, previously thereto, the river Tweed had been excepted, and, therefore, that the act 1696 cannot be construed to apply to it; and the conduct of the appellant, in applying for the act 1771 to Parliament, in order to regulate these fishings, proves this to a demonstration.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland, to give the

proper directions for carrying this judgment into execution.

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For Appellants, *J. Montgomery, Henry Dundas.*  
For Respondents, *Al. Wedderburn, J. Dunning.*

ALEXANDER, EARL OF HOME, CHARLES, EARL)  
OF TANKERVILLE, and Others, } Appellants;  
JOHN, DUKE OF ROXBURGH, and Others, Respondents.

House of Lords, 6th June 1774.

FISHING—ACT 1771—ILLEGAL FISHING.—Held that the Act 1771, against illegal modes of fishing, applied to certain engines and pock nets used in the river Tweed, although the act had no retrospective operation, and the mode of fishing questioned had been for a considerable time practised and established.

Action was raised before the Sheriff in 1771, before the Sheriff of Berwickshire, in name of Thomas Lillie and others, lessees of the salmon fishing in the superior part of the Tweed, against William Turnet, the Earl of Home's lessee of Fairbairn mill, and of his fishing in the river Tweed there, in which action the respondent, the Duke of Roxburgh, and the other proprietors of these fishings, sisted themselves as parties, pursuers, and complainers.

The mode of fishing was by means of the dyke or bulwark across the channel of the river Tweed, in which were inserted the five holes and pock nets described in the previous case. The dyke, it was stated, had likewise immemorially served the purpose of turning the water into the mill lead or aqueduct of Fairburn mill, belonging to the appellant the Earl of Home. The summons set forth:—That by an act passed in the last session of Parliament of Great Britain, "entitled, an act for regulating and improving the fisheries in the river Tweed, and rivers and streams running into the same, and also within the mouth or entrance to the said river,"—it was enacted, that if, from and after the 12th May 1771, any person or persons shall beat the water or place, or set any white object, or any other thing whatever in the said river Tweed, or on, over, or cross the said river, in order to prevent the said fish from entering the said

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river Tweed, or from going up or down the said river, &c. every person so offending, shall, for every offence, forfeit any sum not exceeding five pounds. Nevertheless, the defendant, the Earl of Home's lessee of the Fairburn mill and fishings, had contravened the said act, in so far as, upon the 13th May then last, and upon each of the subsequent days of that month, he had made use of sundry illegal engines, placed in and about the caul or mill dam dyke of Fairburn mill, for fishing the salmon in the said river, and preventing them from going up and down the river, by means of having the dyke so high as to prevent the fish getting over, except in flood tides, and by means of five holes in the dyke, with pock nets fixed therein, and therefore concluding that he be fined in £5. sterling, and that he be ordained to remove the illegal engines, in and about the said caul, in so far as they hinder and obstruct the passage of the fish. In defence, it was contended, that nothing in the above statute 1771 could affect the fishing in question. The sheriff repelled this defence, and allowed a proof of the obstructions. At this stage of the proceedings, the Earls of Home and Tankerville conceived it their duty to appear in the suit, in order to protect their right of property. They presented a bill of advocation of the judgment of the sheriff. It was pleaded against this bill, that the statute had given exclusive jurisdiction to the sheriff to try all offences under it, subject only to appeal to the Justiciary Court. The Lord Ordinary refused the bill, but, on a second bill being presented, both parties agreed to submit to the jurisdiction, and abide by the determination of the Court of Session.

The respondents then contended, that the engines and mode of fishing exercised by the appellants, at their dam dyke, having the direct consequence of preventing the salmon from going up and down the river, the same fell directly within the enacting words of the statute 1771. On the other hand, the appellants, in answer, maintained that the respondents had laid their action improperly; they founded solely upon the statute 1771, which enacts only penalties, yet the respondents prayed that the dam dyke should be taken down and demolished. They further contended, that whatever may have been the views of some of the parties in applying for this act, yet that nothing therein contained did extend or could be construed to affect the mode of fishing exercised by the appellants at this dam dyke. The right of fishing is itself admitted, and this ancient mode of carrying

it on is established. The legislature could not, in natural justice, deprive the appellants of their property without any consideration. That this act only prohibits a certain mode of fishing during *close time*; and, from the title and the preamble of the act, it clearly appeared that this act did not extend beyond this. The fishings, therefore, of the Tweed having been subject to no regulations when this act passed, and it being totally silent as to these, it was to be inferred that every proprietor was to be left to employ every mode and every engine which he could lawfully use before this statute. Besides, the dam dyke, pock nets, &c. used by the appellants in this fishing, are not engines placed to prevent the fish from going up and down the river. The sole and immediate purpose of them is, for taking or killing the fish. And the statute has only relation to engines erected or set up after the date of the act, and not to those previously in use, and established.

The Court pronounced this interlocutor :—“ Upon report Mar. 2, 1773.  
 “ of Lord Gardenston, and having advised the memorials  
 “ given in for the parties, the Lords repel the defences pro-  
 “ poned for the defenders, and remit the cause to the she-  
 “ riff.”

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—The act 1771 neither does, nor was meant to extend to, the mode of fishing exercised by the appellants at their dam dyke. The sole purpose of the statute is to prevent all fishing whatever on the river at certain seasons, when the fish are depositing their spawn, and to preserve the young fry and brood of salmon. The preamble states, “ That salmon gilses, salmon trouts, and whitlings, and the spawn or fry thereof, are frequently killed, taken, and destroyed at improper seasons in the river Tweed, and the rivers and streams which run into the same, and also within the mouth or entrance of the said river, to the great detriment of the owners and occupiers of the fisheries, and loss to the public : For remedy whereof,” &c. The sole objects, therefore, of the act were to prevent the taking and destroying these fish at improper seasons, and to improve the fisheries for the benefit of the *owners* and occupiers. But the respondents construe this statute into an entire destruction of all modes of fishing previously established, and, of consequence, to the appellants’ mode of fishing, though exercised beyond the memory of man. The clause in the

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statute, upon which the respondents rely, as chiefly operating against the dam dyke, can neither be extended to it in words, nor by construction. In the whole clause dam dykes of any kind are never mentioned, and the clause only inflicts penalties on such as should, after the 12th day of May 1771, use the unfair practice of beating the water, or place or set any white object on the river to frighten the fish from going up the water.

*Pleaded for the Respondents.*—The mode of fishing complained on the part of the respondents, and the engines therein used, are prohibited both by the laws of England and Scotland; and as they have the direct effect of preventing the fish from going up and down the river, they fall within the intendment and enactment of the late statute of 1771. The practice of driving the salmon out of the pinfolds into the back nets, falls within the *ipsissima verba* of the statute, whereby persons are prohibited to beat the water, which the appellants always do when they observe salmon in the pinfolds.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be affirmed.

For Appellants, *Alex. Wedderburn, J. Dunning.*

For Respondents, *Ja. Montgomery, Henry Dundas.*

Not reported in the Court of Session.

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(M. 7221.)

JOHN BOYD,	-	-	-	<i>Appellant;</i>
JAMES STEEL,	-	-	-	<i>Respondent.</i>

House of Lords, 10th March 1775.

**ABSOLUTE DISPOSITION—BACK BOND—REDEMPTION—IRRITANCY.**

An absolute disposition was granted to lands bearing to be sold for a fair and adequate price then advanced, with a back bond of same date, allowing redemption of the lands within five years of the date thereof. This period expired without repayment. Held, in the Court of Session, that after expiry of the term, though no declarator of irritancy had followed, the lands were to be held irredeemable for

the price then paid—that price being a fair value at the time. For full report of case *vide* Morison, p. 7221. 1775.

On appeal to the House of Lords, it was  
Ordered and adjudged that the interlocutors be affirmed, scott, &c.  
with £50 costs.

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r.

For Appellant, *Dav. Dalrymple, John Dalrymple.*

For Respondent, *Ja. Montgomery, Gil. Elliot.*

(5844.)

Messrs. ANNAND and COLQUHOUN, and their  
Assignees, and Messrs. GIBSON & BAL- }  
FOUR, Merchants, Edinburgh, and their } Trustee, - - - - - } *Appellants;*  
HELEN CHESSELS or SCOTT, and JAMES } SCOTT, her Husband, - - - - - } *Respondents.*

House of Lords, 24th March 1775.

**Jus Mariti—Exclusion of Do.**—Where a party conveyed his heritable and moveable estate to his daughter, in trust for behoof of herself and children, excluding her husband's *jus mariti* in the event of his insolvency; Held that his creditors were not entitled to claim any of his moveable estate, the same being vested in the daughter; but that they were entitled to claim the rents of the heritable, and *interest* of the *moveable estate* up to the date of the husband's insolvency, on which event his right of administration ceased, in terms of the express provision in the settlement.

The deceased Archibald Chessel had, for a number of years prior to his death, considerable business transactions with Mr. Scott, who was married to his daughter, the respondent, Helen Chessel.

Before his death he executed a settlement, setting forth this narrative:—" Considering it possible, though I hope "not probable, that James Scott, merchant in Edinburgh, "spouse to Helen Chessel, my daughter and only child, "may, after my death, fail in his circumstances, and become "insolvent; and in case my daughter (the respondent) as "heir and executor to me, was to succeed to my estate, he- "ritable and moveable, without any limitations or restric- "tions, the same, at least to the amount of her husband's "jus mariti, may be evicted by his creditors for payment of "his debts, and she may be induced to grant deeds in pre-

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" judice of herself and her numerous family of children." Therefore he disposed and conveyed all his heritable and moveable estate, which might belong to him at the time of his death, to his said daughter the respondent, " her heirs and assignees, *in trust*, for behoof of herself and children, " in manner after mentioned." The deed then refers to an inventory of his grounds of debt, docqueted and subscribed by him, of the same date with the trust-deed, and he nominates " his daughter sole executor, " and that in trust for behoof of " herself *in liferent*, for aliment and support of herself and " numerous family of children, and after her death for behoof " of her three sons, Archibald, William, and James Scott." " And in case, in the event of the said James Scott his in- " solvency, I hereby seclude and debar him, the said James " Scott, his *jus mariti*, and him from the administration and " management of my said estate, heritable and moveable, " hereby disposed, and the rents, annualrents, and other pro- " duce and profits of the same;" " and I hereby declare the " same shall be neither liable nor subjected to the payment " of his debts, implement of his deeds, nor affectable by the " diligence of his creditors." Scott was provided, in the event of his surviving his wife, with a free liferent of £100. Certain trustees were named to act along with his daughter in the management of his property in the event of her husband's insolvency.

After Archibald Chessells' death, it was alleged that James Scott did certain acts which were intended to raise credit on the strength of his *jus mariti*. Certain transactions were thereupon entered into with Messrs. Annand and Colquhoun, whereby Mr. Scott became largely their debtor; and the present question was commenced by the appellants executing a poinding of a parcel of timber, in the possession of Mr. Scott, valued at £248; whereupon Mrs. Scott presented a bill of suspension, on the ground that the timber belonged to her father at the time of his death, and now belonged to her in virtue of her father's settlement, to the exclusion of her husband's *jus mariti*. The bill was passed. But afterwards other arrestments having been used, the question before the Court assumed the character of a competition, in which Mrs. Scott contended that her husband's *jus mariti* over the moveables was expressly debarred and excluded by the deed of settlement above mentioned. She further argued, that it was in the power of the father to make his set-

tlement on any terms, and under any lawful conditions he thought proper. The exclusion of the *jus mariti* was a lawful condition, and in many cases, if not in all, a most proper beneficial arrangement.

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In answer, it was contended, that the exclusion of the *jus mariti*, whatever effect it might have against creditors contracting with him subsequent to the publication, could not operate against prior creditors; and that an eventual exclusion, in the case of insolvency, was a device highly dangerous and illegal, and calculated to defraud creditors. In the present case, the insolvency of his son-in-law was well known to the maker of the settlement. But the *jus mariti*, which is a right conferred by law, and operates on marriage by force of law, cannot be altered by the mere deed of a third party. Creditors are entitled to rely on the rights of a husband over his wife's estate, and to deal with him on the faith of it. This interest in the wife's estate is a *jus individuum*, which may be carried by an adjudication, or which would fall under the husband's escheat, and in either of these cases, the whole right would pass, including not only the rents already become due, but those which may afterwards arise during the marriage; and the question is, Whether the husband's creditors can be deprived of the benefit of this estate, by a latent deed unknown to either? By no deed whatever can the moveable estate of a debtor be taken away from his creditors by a mere exclusion of the *jus mariti*. The presumption of ownership and property from possession totally excludes it. Besides, the exclusion of the *jus mariti* here was merely eventual, namely, on Mr. Scott's insolvency, and not an absolute exclusion from the beginning. It, therefore, could not operate to all effects. It could not affect the claims of creditors prior to that event, but only of subsequent creditors.

The Court pronounced this interlocutor: "Find that Ar- Mar. 4, 1774.  
 "chibald Chessels' heritable subjects, and also his moveables,  
 "executry funds, including the timber, and the rents of his  
 "lands and houses, and annualrents due to him at and pre-  
 "ceding the time of his death, in November 1768, were vest-  
 "ed in Helen Chessels, his daughter, in trust for the pur-  
 "poses mentioned in his deed of settlement, and were not  
 "affectable by James Scott or his creditors; and find, that  
 "the rents of the heritable subjects, and interest of the ex-  
 "ecutry funds, which fell due from the time of Archibald's  
 "death, until the time of James Scott's insolvency, in De-

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" cember 1769, (during which time Helen Chessel and her  
 " children were almented by James Scott), fell under the  
 " right of administration of James Scott, and are affectable  
 " by his creditors ; but find, that in December 1769, when  
 " James Scott became bankrupt, his right of administration  
 " of the said subjects ceased, and that the rents and annual-  
 " rents that fell due thereafter, belong to Helen Chessel  
 " and her children, in terms of Archibald Chessel's settle-  
 " ment, and are not affectable by James Scott's creditors,  
 " and remit to the Lord Ordinary to proceed accordingly ;  
 " reserving to the creditors to be heard before the Ordinary,  
 " how far James Scott was a creditor upon Archibald Chessel's  
 " estate, at the time of his death, or how far said estate has  
 " been benefited since that time out of Scott's funds ; and  
 " also reserving to the parties to insist before the Ordinary,  
 " in their respective claims of preference, upon the foresaid  
 " rents and annual-rents falling under James Scott's right of  
 " administration foresaid, and with power to his Lordship to  
 " do further in the cause as he shall see just, and with  
 " these explanations and additions, adhere to their former  
 " interlocutor reclaimed against," which found that Mr.  
 Scott had become insolvent in 1769,—had retired to the  
 sanctuary ; and had made over his effects to his creditors.

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—An eventual exclusion of the *jus mariti*, in case of insolvency, is an unfair device, calculated to ensnare creditors, and to defraud them of their just rights. Creditors are entitled to rely, and in the present case, the appellants were entitled to contract, upon the faith of Scott's legal rights over his wife's estate, that estate being then in possession. And even the deed of settlement founded on by the respondents, does not absolutely exclude the *jus mariti*. It only excludes on a certain event, namely, on insolvency, but as the wife had it in her power to prevent this, they had it in their power to make this condition operate or not just as they chose ; and such, therefore, cannot be sustained to the hurt of creditors, especially in regard to a deed which they studiously concealed, for the avowed purpose of raising credit. The conduct of the respondents, therefore, in the contraction of this debt, ought to be held as sufficient to bar them from taking advantage of the deed. The appellants admit that the right of the wife was a trust,—that she had merely a liferent of the estate, the fee being in the children ; but while they concede

this, they maintain that this liferent fell under the *jus mariti*, not only by operation of the law, but by the settlement itself; and, therefore, the appellants, as Scott's creditors, are entitled to come in his place.

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*Pleaded for the Respondents.*—An unlimited proprietor can settle his estate as he pleases, and full effect must be given to every lawful condition annexed to such settlement. The estate here was conveyed by the testator, to his daughter in trust, for behoof of her in liferent, and her children *nominativm*; and the condition adjected to this was, an absolute exclusion of her husband's *jus mariti* in the event of her husband becoming insolvent. This event took place, and thus prevented and barred him or his creditors from touching the moveable estate, or the rents of the land estate, descending by this settlement, including the timber arrested, which belonged to the deceased Archibald Cheddles, and was carried by the settlement.

After hearing counsel,

LORD MANSFIELD said:

"That the intention of the testator being clearly and expressly evident, the deed gave a vested interest to the daughter and her children, exclusive of her husband's *jus mariti*, in the event of his insolvency.—This right being exactly similar to that created by a trust estate in England, for the sole and separate use of a wife, or a wife and her issue; and therefore moved to affirm."

It was ordered and adjudged that the interlocutor be affirmed.

For appellants, J. Montgomery, Al. Wedderburn, Henry Dundas.

For Respondents, E. Thurlow, Dav. Rae, Alex. Murray.

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WILLIAM LORD FALCONER, of Halkerton                      *Appellant;*  
 ROBERT TAYLOR, DAVID BEATTIE, CHRISTIAN  
 Low the Widow, and JAMES Low the Son }  
 of JOHN Low, and Others, Tenants upon }  
 the Appellant's Estate, in Kincardineshire,              *Respondents.*

House of Lords, 7th April 1775.

LEASE—AMBIGUOUS CLAUSE—PAROLE PROOF.—Construction of clause in lease for 57 years, to renounce at the end of every 19 years, in the option of lessor and lessee. Held, this not to im-

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port an option, to be exercised by the landlord alone, without the consent of the tenant. But reversed in House of Lords, and remitted to the Court of Session, to take proof of what was the understanding of the parties on entering into the lease, the clause itself being ambiguous.

In 1756 Alexander, late Lord Falconer of Halkerton, granted to the several respondents, leases of farms upon his estate, for 57 years; or three times nineteen years, from Whitsunday 1756. These leases contained this clause, "And " to renounce at Lammas, before expiring of each of the " said three nineteen years, in the option of the said Lord " Halkerton, and the said —— the lessee."

The present question arose in regard to the import of this clause. And action was brought by the appellant, to compel the tenants to renounce at the end of the first nineteen years, insisting that the import of the clause, was to give an option to the lessor and lessee to determine the lease, at the end of the first or second nineteen years, in the option of either, and that, having adopted that option, he was entitled to insist on their renouncing at the end of the first nineteen years. In defence, it was contended, that the true import and meaning of this clause, was to give an option to renounce at the end of the several periods, only with the *joint consent* of lessor and lessees—that the option to be exercised was a joint option to be exercised, by both agreeing to terminate the lease at these periods—that this was the understanding of the tenants, as well as the late Lord Falconer, who granted the lease, and that, on the faith of this they had laid out improvements, planted trees, and built houses.

Dec. 7, 1773. The Lord Ordinary, of this date, pronounced this interlocutor, " Find the clause in the said tacks, founded on by " the pursuer, imports an option reserved to Lord Halkerton, " and also to the tenant, in case either should use the " same; and that the tenant is bound to renounce the tack, " at the requisition of Lord Halkerton, in terms of the " said clause. Therefore, repel the defences, and decree " against the several defenders, in terms of the conclusions " of the libel." Which interlocutor, upon representations

Jan. 18. 1774. from the respondent, he adhered to, by two subsequent interlocutors.  
Feb. 26, —

On reclaiming petition to the whole Court, the Lords, of July 27, 1774. this date, pronounced this interlocutor, " adhere to the interlocutors of the Lord Ordinary, reclaimed against, and " refuse the desire of the said petition."

The respondents again petitioned the Court, whereupon the Lords pronounced this interlocutor, " sustain the de-fences, asoilzie the defenders, and decerned."

Against this interlocutor the appellant brought the present appeal.

*Pleaded for the Appellant.*—The clause in the leases binds the respondents as tenants, " To renounce at Lammas, before expiring of each of the said three nineteen years, in the option of the said Lord Halkerton, and the said lessee;" and the obvious meaning of this clause is, to give an option or power to each, to determine the lease at the end of the first or second nineteen years, if either should think proper so to do. If the clause is obscure, it can admit of no other consistent interpretation than this. Because, any other would do substantial injustice to the landlord, the meaning of the clause being, that the landlord might have the benefit of the gradual rise in value of land, which was then increasing, as well as the rents of lands; and the reason which the appellant gives, coupled with the facts and circumstances as to a great fall in the rents of lands in Kincardineshire, is purely fictitious, and wholly without proof or foundation. But, in point of fact, the clause in the lease is not obscure or ambiguous, and, therefore, any explanation by facts and circumstances, or parole proof, cannot be admitted to annul a clause, in a solemn written contract, explicit in its terms. It is, therefore, plain and intelligibly expressed; and *superflua non nocent*, could not apply, as there was no superfluity of expression, nor was the maxim *verba fortius accipiuntur contra proferentem*, founded on by the respondents, better applicable, this not being a unilateral deed or grant, but a deed containing a mutual contract.

*Pleaded for the Respondents.*—The clause in the leases in question, when soundly construed, signifies a power or option given to lessor and lessee, i. e. to landlord and tenant, to determine the lease by joint consent at the end of the first or second nineteen years; and there are many circumstances which go to support this very rational interpretation. The tenants were to plant trees and to build houses; it hence became indispensable to their interests, after such serious expenditure, and where their patrimonial interest was so much involved, to have a voice in the option, so that the power, when exercised, might not prejudice their rights. If the construction of the appellant were the correct one, he might derive a most eminent advantage over the tenant, by cutting it short at the end of the first nineteen years,

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without any relief or question for the tenants' expenditure. That superflua non nocent, and verba fortius accipiuntur contra proferentem, were maxims that ought to apply here, the more especially where the respondents were ignorant country people, who did not attend to this clause. That, in point of fact, the reason for giving an option to the tenant joint with that of the landlord, was, that at this time the rent of lands was greatly falling, and unless he would exercise this power, he would be tied down for 57 years, however much the rent of land may have fallen during that period. The respondents therefore took their farms on the distinct understanding that this was the meaning of the clause. Such was the meaning the late Earl attached to it, who bound them to plant trees, and which manifestly pointed out a lease of longer duration than one liable to be put an end to, by the will of the landlord, at the first period of nineteen years. On the faith that the clause gave them a mutual right of consent and question in the power to be exercised, they entered on possession, planted the trees, and erected the buildings of great value upon the lands, and inclosed the grounds even beyond what was stipulated in the leases which gave a claim to continue possession for the whole 57 years, except they chose to give them up, with the consent of the landlord, at the periods therein specified. But if any inaccuracy has arisen in drawing the leases, to render the real meaning of the clause obscure and ambiguous, such inaccuracy, according to the established principle of law, must be construed against the grantor, and not against the tenant, who has acted on the faith of a different bargain ; and such the whole circumstances connected with the leases go to prove and establish.

After hearing counsel, Lord Mansfield moved the reversal of the judgment below. And it was therefore

Ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session, with liberty to the respondents to go into the proof of such controverted facts as may by law be competent to their defence ; and also to bring a cross action for their relief in case they shall be advised so to do.

For Appellants, *Al. Wedderburn, Al. Forrester, Gilbert Elliot.*

For Respondents, *E. Thurlow, Alex. Murray.*

*Note.—Unreported in Court of Session.*

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JAMES CUTHBERT of Farnese, - - - Appellant; CUTHBERT  
 ANNA MACKENZIE or PATERSON, and RICHARD } Respondents. PATERSON, &c.  
 PATERSON, her Husband, for his interest, ".

House of Lords, 13th Nov. 1775.

**DEED—TUTORIAL EXPIRY OF DO.**—A deed contained a conveyance of subjects and effects to the wife, and a particular assignation of certain bonds therein, “to her, and her heirs and assignees,” with provision, that after paying debts, the residue was to be enjoyed by the widow in livery and child in fee, giving to the widow the power of distribution and division, and also nominating her tutrix to the children. Held, where the widow had recovered payment of one of the bonds, after the death of her husband, and after her second marriage, that she had only a livery of the same, and that she could not recover payment, and validly discharge that bond, either in her own right, or as tutrix for her children, her office of tutrix expiring on her second marriage.

David Mackenzie, the respondent's father, died while she was an infant, leaving her mother a widow, who, six months thereafter, got married a second time, to Robert Edwards, a teacher in Inverness.

Sometime previous to her father's death, her father had lent out money on bonds—one of these was granted by Mr. Mackenzie of Allangrange for £100, the other by Mr. Macleod of Cadboll for £200, both of these being taken payable to the said David Mackenzie, his heirs and assignees, burdened with a livery to Isabel Macrae his wife, the respondent's mother.

Of this date, her father executed a disposition and assignment or settlement in the following terms: “I hereby make and constitute the said *Isabel Macrae, her heirs or assignees*, my lawful cessioners and assignees in and to the sum of £200 sterling money of principal contained in a bond, dated the 15th day of Dec. 1746 years, granted by Roderick M'Leod of Cadboll to me, my heirs and assignees, and, in case of my decease, to the said *Isabel Macrae, my spouse*, in livery, payable against the term of Martinmas then next, and bearing annual rent from the term of Martinmas preceding the date of the said bond, with £40 money foresaid of liquidate penalty in case of failure.” Other debts and effects are then enumerated. The deed then “assigns *Isabel Macrae, and her foresaids* in and to the haill annualrents due or that shall be due on the principal sums contained in the said bonds above narrated,

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v.

PATERSON, &c. " " on," &c., " *with and under the burdens and conditions un-*  
 " *derwritten*, viz. To make payment of all the just and law-  
 " ful debts that shall be due by me at the time of my de-  
 " cease; and that *whatever free goods, gear, debts, and*  
 " *sums of money, that shall be due or belong to me, at the*  
 " *time foresaid, shall be liferented by the said Isabel Macrae,*  
 " *my spouse, during all the days of her lifetime, and that the*  
 " *children procreate, or to be procreate betwixt us shall*  
 " *have right to the fee thereof,—the distribution, division*  
 " *thereof amongst the said children, to be made by the said*  
 " *Isabel Macrae, as she shall see just and reasonable, and*  
 " *according to their deserving, by a bond of provision, or*  
 " *any other deed under her hand.*" He also nominated and  
 appointed " the said Isabel Macrae, during all the days of  
 " her lifetime, and after her decease, my friends aforesaid,  
 " or either of them, to be sole tutrix or tutor, and curatrix  
 " or curator to our said children, during their pupillarity and  
 " minority."

Isabel Macrae never exercised the power of division con-  
 fered upon her. Her second marriage was unfortunate.  
 Edwards was in debt, by bills to a large amount, two of which  
 were owing to the appellant James Cuthbert, for £73. 13s.  
 9d. each. With the view of paying this debt, he prevailed  
 on his wife, Isabel Macrae, to execute a conveyance of Mac-  
 leod's bond, for £200, to the appellant, which conveyance  
 was accordingly signed by her, and handed over to Cuth-  
 bert, who demanded payment from Macleod. The latter re-  
 fused, on the ground that the appellant had no right to re-  
 ceive payment of the bond, the fee of which being in the  
 deceased's children, and his widow having only a liferent.  
 Afterwards, however, Isabel Macrae, Edwards, and the ap-  
 pellant, formed a plan by which to get over this difficulty;  
 they made Isabel Macrae make a demand in the capacity of  
 tutrix, on the supposition, that in this character of trustee,  
 she at all events had power to enforce payment, and recover  
 the contents of the bond. Into this plan Macleod himself  
 was drawn, his only objection to pay being an insufficient  
 discharge. By this plan, Macleod agreed to present a bill  
 of suspension, to try the validity of this proposed new dis-  
 charge. The objections to the demand of Isabel Macrae  
 were stated, but, contrary to expectation, deemed so im-  
 portant as to call upon the Lord Ordinary to report to the

whole Court, who unanimously passed the bill to try the question. But, by an after transaction, to which Cuthbert and Macleod became parties, the former agreed to repay the latter, if any question should afterwards be raised by <sup>PATERSON, &c.</sup> the children, and thus the appellant obtained a decerniture in his favour.

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Some considerable time thereafter, the respondent Anna Mackenzie, the only child and executor of her father, David Mackenzie, raised action against Macleod for payment of his bond of £200, as fiar therein. She stated that her father had died without leaving any debt owing—that his means otherwise had been considerable, and had been taken possession of by her mother; and she having been the fiar of that bond, she was now entitled to recover the same. Macleod brought an action of relief against Cuthbert; and both processes being conjoined, the Court, of this date, pronounced the following interlocutor: “Find that the £200 in “the deceased Cadboll’s bond to David Mackenzie was “taken up by Isabel Macrae, in consequence of a fraudulent “contrivance on the part of James Cuthbert; and therefore “find Robert Bruce Aeneas Macleod, now of Cadboll, and “his tutors and curators (if he any has) for their interest, “and the said James Cuthbert, liable conjunctly and severally to the pursuer, Ann Mackenzie and her husband, “in repayment of the said sum of £200 sterling, and the “interest thereof since the 12th June 1761, when the “said Isabel Macrae died, and in time coming till payment, “and decern. Find the pursuer, Ann Mackenzie and her “husband entitled to expenses. Find James Cuthbert liable “to Cadboll in full indemnification of the sums he shall pay “to the said Ann Mackenzie, and decern.”

July 27, 1774.

On reclaiming petition the Court adhered.

Aug. 10, 1774

Against these interlocutors the present appeal was brought to the House of Lords.

*Pledged for the Appellant.*—That Isabel Macrae had power to receive the sum in the bond from Macleod, because her heirs and assignees were mentioned in the deed, and a power given to her of distribution, and to receive payment, and grant discharges. Her interest, therefore, was not limited to a simple liferent merely. The children were to have the fee, but then it was the fee only of the residue, after all burdens and debts were paid; but, assuming that her interest was limited to a mere liferent, her title otherwise to recover payment was indisputable. The deceased’s settlement was

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*v.*

PATERSON, &c. There was something more than mere tutory here. There was a trust reposed in her, which is an office of a more permanent character, and which, as declared in the deed itself, was to last *during her life*. It could not, therefore, fall on her second marriage, but subsisted by force of the deed, and the deceased's own nomination. But, further, she had a power to enforce payment, by force of the special assignment in her own name. "I hereby make and constitute "the said Isabel Macrae, *her* heirs and assignees, my lawful "cessioners and assignees, in and to the sum of £200 ster- "ling of principal, contained in a bond," &c. It thence ap- pearing that Isabel Macrae, being invested with all the rights which before were in the maker of this deed, was entitled to recover and grant valid discharges of the bond in question, and this power, if in her as amply as it was in the maker, could not be abridged or nullified by her sub- sequent marriage, her right as legatary and assignee being thereby unimpaired.

*Pleaded for Respondents.*—The original bond granted by Macleod of Cadboll was taken to the children in fee, the wife having only a liferent. And by the subsequent settle- ment, executed by David Mackenzie, the fee of the whole, and not the residue, was still conveyed to his children, the wife being confined to a liferent. To this was her interest limited. In addition, he made her tutrix and curatrix to her children, for preserving the estate, and with such powers only as a tutrix could exercise for the advantage of the estate confided to her, and proving beneficial to the children. Such being the nature of the deed, and such her limited interest and power under it, Macleod could not, while in the knowledge of this deed, pay the bond in *bona fide* to Cuth- bert, because, neither from the nature of her interest, which was that of mere liferenter, nor as tutrix, could she have a title to receive payment and discharge the same. Besides, even if at any time she had such a power, this power as tutrix, was put an end to by her second marriage. Macleod, therefore, before paying, ought to have considered this ques- tion—whether her office of tutory subsisted after her second marriage? By that event, the respondent contends her tutory came to an end, and payment then to Macrae was inept and illegal. Ersk. b. i. tit. 7, § 29 says: "The office both of

"tutory and curatory expires; First, By the marriage of a female tutor or curator. Thus, when a father names his wife as tutor to their common child, the nomination was adjudged to fall upon her second marriage, both from the impropriety of a woman having one under her power, who is herself subjected to the power of another, March 8th 1636, Stewart, *vide supra*, § 12." Hence, her powers having expired on her marriage, her right was then reduced to a mere liferent, which did not entitle her to discharge and uplift the bond. The whole plan, by which the conveyance of the bond was devised, was undoubtedly intended as a fraud, for the purpose of disappointing and carrying off the children's estate.

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v.

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After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Dav. Rae, Ar. Macdonald.*

For the Respondents, *Alex. Murray.*

Not reported in Court of Session.

EDWARD HEWIT, surviving Partner of HEWIT and BROCKHURST, - - - } Appellant;  
DAVID ELLIOT, GEORGE M'CRAE, SIMON BROWN, JOHN AULD, and JAMES BALLANTINE, Trustees for the Creditors of ANDREW STEVENSON, Merchant Glasgow, } Respondents.

House of Lords, 6th Dec. 1775.

BANKRUPTCY—RETENTION—ADMISSIBILITY OF WITNESS—INTEREST—TUTORING.—Circumstances in which a party, having procured possession of bills in a legitimate manner, though sent for, and to be appropriated to a special purpose, was held entitled to retain these bills in payment *pro tanto* of his own account, against the creditors of the remitter of these bills: reversing the judgment of the Court of Session. Circumstances in which objection to examination of witness, on the ground of interest, not sustained. Also objection to witness, as having been tutored, and having perused the papers, &c., in the cause, repelled.

The appellant, and his deceased partner Brockhurst, car-

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v.  
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ried on business in London as wholesale mercers, and merchants in London, under the firm of Hewit and Brockhurst. They had extensive dealings, as such, with Scotland, and, among others, with Andrew Stephenson, merchant there, who was at this time their debtor in account.

Stephenson, at the time alluded to, had been in the practice, in order to support his credit in business, of drawing and redrawing bills on London: and, for these purposes, Dove and Reynolds, merchants, London, were their correspondents. This system of credit having received a shock, gave general alarm to all who had bills in the circle; and Stephenson, having bills in the circle, became apprehensive lest they should be returned. On advising with Brown and Auld, two of his correspondents, and learning that two of these bills had been returned, he despatched Jamieson (who was connected with Stephenson in trade) to London, with a parcel of bills, drawn on London, amounting to £1119, for the purpose, that if he found Dove and Reynolds in good condition, and able to go on, these bills might be handed to them, that they might accept, and be able to pay the bills in the circle. Jamieson had letters of recommendation to Hewit and Brockhurst from John Auld, and from Brown of the Ayr bank in Glasgow, which were intended to aid and assist Jamieson's mission. He had special written instructions from Stephenson as to the application of the money bills for £1119 sent with him. He was only to hand them over to them if he found Dove and Reynolds all right. If not, he was to retain them for him; but Hewit and Brockhurst, to whom he was introduced, were to direct him in this.

Jamieson arrived in London on Friday evening, the 26th January. He called immediately at the appellant's house, and not finding him at home, left his two letters from Stephenson and Brown; but was informed that Dove and Reynolds had stopt payment, whereupon he wrote off that night to Stephenson, intimating the failure.

The next night after Jamieson left for London, Stephenson, who, in the meantime, had received bad intelligence of Dove and Reynolds' affairs, wrote to Jamieson on 23d June, stating, "All the service you can do me is to retain 'every thing in your hand that you took up.' " "I fear it 'is too late for all those things."—"Retain every thing you 'can, without mentioning what you was to bring up."

It was stated, that on the 24th June, Stephenson again

wrote to Jamieson, stating, "I fear every thing is too late." — "Keep what you have, and make speed home." I am, &c. And another on 25th June: "I wrote you last night, "and have only now to beg that you will come away the moment you receive this, and bring back what you took with you, what you took entire."—"It is too late to profit by your good offices now."

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These letters did not arrive until 29th June. In the meantime, Jamieson, on calling next morning (27th June) after his arrival, on Hewit and Brockhurst, at their counting house, shewed the bills he had brought with him, amounting to £1119, and informed them of his instructions to have paid them to Dove and Reynolds had they been in good condition to go on and meet Stephenson's bills. Jamieson proposed to give the bills to Hewit and Brockhurst on Stephenson's account. The bills were received by them, and entered in their books on 27th June, and an advance of £200 given upon them.

When Jamieson received Stephenson's letters on the 29th June, he called immediately on Hewit and Brockhurst to obtain, in terms of his instructions, delivery of these bills; but they refused to give delivery, and claimed retention of them in payment *pro tanto* of their account.

On Stephenson's failure, action was raised by his trustee, after using arrestments, *jurisdictionis fundandæ causa* against Hewit, the only surviving partner of Hewit and Brockhurst, for repetition and payment, on the ground that the bills were sent for a special purpose, and that Jamieson had no power to use them in any other way. That by the bankruptcy of Dove and Reynolds, possession was at an end; and all he had to do was just to return with these bills, and therefore the defender had no right to retain them in compensation of his debt against Stephenson, but only a right to rank on the estate.

A proof was allowed and led of the circumstances attending the whole transaction. When it was offered to examine Jamieson as a witness, his admissibility was objected to by the appellant, on the ground of interest, because, if he had disobeyed his instructions, he was answerable for the consequences; and that he had given evidence by an *ex parte* affidavit on oath, which he would not gainsay without the pains of perjury; besides, he had volunteered in writing to a witness in London, endeavouring to bring him to join in his version of the story, which made his evidence exceptionable. The Court, however, of this date, "repelled the Mar. 2, 1771.

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" objections to the examination of Jamieson as a witness in  
 " the cause, and remitted to the Lord Ordinary, on the Oaths  
 " and witnesses to take his examination." When he was ex-  
 mined, two objections emerged, 1. That he had been tutored  
 by the respondents, he (Jamieson) having acknowledged that  
 he had received from them the papers, evidence, and argu-  
 ments in the cause to peruse, which was *per se* sufficient to  
 reject him ; and, 2. That he had been accommodated by the  
 trustee, in the debt and engagement he was under to the  
 estate of Stephenson, on account of his partnership with  
 him, by taking his bond for the money he owed. The proof  
 being reported with the objections : After debate,

Feb. 17, 1775 The Court thereafter pronounced this interlocutor:—  
 " The Lords having resumed consideration of this cause, with  
 " the papers and proceedings therein, the testimony of the  
 " witnesses adduced, writs produced, and memorials *hinc*  
 " *inde*, and heard parties' procurators thereon, and advised  
 " the whole, they repel the defences, and find that the de-  
 " fenders, Messrs. Hewit and Brockhurst, are not entitled  
 " to retain the balance of the bills in question ; but are  
 " bound to pay the same to the pursuer's trustees for Ste-  
 " phenson's creditors, and that they have right only to a  
 " part thereof, in proportion with the said creditors, and  
 " remit to the Lord Auchinleck, the Ordinary who pro-  
 " nounced the act, to proceed further in the cause, and to  
 " do as he shall see just."

Against these two interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—1st, Weighing the whole evi-  
 dence in the cause,—the correspondence of parties,—the uni-  
 form account given of the transaction with Jamieson by the  
 appellant,—his answers to the original interrogatories, sup-  
 ported by the written and parole evidence, it is clearly es-  
 tablished that the bills were fairly and *bona fide* placed with  
 Hewit and Brockhurst, not for the special purpose of accept-  
 ance, but lodged with and paid to them on account of Steph-  
 enson. This was demonstrated by the immediate advance of  
 £200 upon them, and after giving Stephenson credit for the  
 full amount of these bills, he owed them a balance on account  
 of £147. They were delivered to the appellant, blank  
 indorsed by Jamieson, and passed into the possession of  
 Hewit and Brockhurst, like so many bank notes, duly and  
 fairly obtained. Having therefore been fairly obtained on  
 27th June, without any third party having any *jus queritum*  
 in them, he was entitled to apply the balance of the bills on

Stephenson's supervening bankruptcy in extinction *pro tanto* of his account. No doubt the original intention of placing the bills in their hands was, that he might receive payment, and be accountable to Stephenson for the contents, but on bankruptcy this did not prevent them from retaining them in extinction of his own debt. Nor does it at all affect the question of the transfer of these bills, or the appellant's right to retain, that Jamieson had no authority to transfer them to the appellant, and in so doing, was guilty of a breach of trust, and had exceeded his commission; because the transfer of bills cannot be affected by any thing not appearing *ex facie* of the bills themselves. Nor does it affect the question in like manner, that Jamieson had private instructions to be cautious; or that he had written Jamieson afterwards countermanding his instructions as to these bills, and ordering him to bring them back with him; because, in Stephenson's letter of instructions which accompanied Jamieson, there was this proviso in case of Dove and Reynolds being found to be bad, "to try if friend *Hewit could dis-*  
*"count them for him;*" and also because the other letters, countermanding these instructions, arrived too late,—not until after the transaction was completed. Nay the letters themselves seem to anticipate that they will be too late. The maxim, therefore, of the civil law should hold *frustra petis quod mox es restiturus*; such rule of retention has been adopted by almost every trading nation, and it is consistent with justice, that where parties are mutually debtors, the one should not be allowed to withdraw his funds out of the hands of the other, without satisfying his debt. Which rule ought to receive a more ample latitude, when it is pleaded Ersk. b. 3,  
where the debtor, as in this case, was *vergens ad inopiam.* tit. 4, § 20.  
2d, The Court of Session ought to have sustained the objections to the admissibility of Jamieson, who, by his own confession, when examined, was objectionable on the ground of being tutored by receiving the papers, evidence and arguments in the cause to read. 3d, That he had been accommodated by the trustees in the debt due by him to Stephenson's estate. 4th, That he was materially interested in the cause, from his connection in partnership with Stephenson, and that he had already deponed to the transaction in an affidavit taken on oath *ex parte.*

*Plead for the Respondents.*—Hewit knew well the object and purpose of Jamieson's mission to London. He knew that he came as a special messenger from Stephenson, with bills in his pocket for the purpose of supporting his credit

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in the circulation business, which was endangered by some heavy failures. Knowing therefore that these bills were destined for a specific purpose, Hewit must have been aware, when he obtained possession of them, that Jamieson had no authority to dispose of them to him, and thereby to divert them from that special object. When they were put into the appellant's hands, they were placed there without authority or consent of the owner, and the property in them therefore remains untransferred. Hewit and Brockhurst could not be viewed as indorsees for a valuable consideration, but as having got them into their hands for a special purpose, without Stephenson's consent, and thereafter converting them to a different purpose. What the appellant says is, that they were handed to him in payment *pro tanto* of his account. Jamieson had no authority to make such payment, nor did he mean to make payment at all. He left the bills merely for a temporary purpose, for acceptance on Saturday, and was surprised, when he asked them back on Monday following, to hear Hewit and Brockhurst say, that they would retain them in compensation of their claim. Nothing had intervened to change the ownership of the bills. On Saturday they were placed in the hands of the appellants as the property of Stephenson. The custody was parted with, but not the property. Nothing intervened to change that character; and bankruptcy, when operating as a transfer of the property of bills, operates always in favour of the trustees of the bankrupt. Besides, if Jamieson had any instructions at all to deal with Hewit and Brockhurst, and transfer to them the bills on discount, these instructions were timeously countermanded by letter from Stephenson to Jamieson, which he received on Monday the 29th, and which induced him to ask them back. They were put into their hands on Saturday, next day was Sunday, and they were asked back on Monday. Such being the nature of the transaction, the appellant had no right of retention over them, but must take his share of the common fund for his debt 2d. As to the objection to the admissibility of Jamieson as a witness, he was in no manner interested in the event of this cause. He is neither Stephenson's partner nor creditor, so that, whether the appellants have a right of retention or not, or the respondents a right to recover, is, in point of interest, matter of perfect indifference to Jamieson. As to the interest he has in defending his own conduct in the transaction, it is sufficient, that he is not made a party in this or

any other suit for that misconduct; and so he cannot be rejected on the score of interest on that ground. If any questions put to him had tended to criminate him he might have refused to answer, but this rule is an indulgence to the witness, and not an objection to him. And as to the objections founded on the affidavit, it is evident that the witness cannot be rejected on this account, which is not of the nature of a judicial act; and which, therefore, cannot render him inadmissible.

After hearing counsel,

**LORD MANSFIELD** said:—

“ That the point in question was merely, whether the appellant had a right to set off certain bills, remitted for another purpose, towards a debt due to himself, before the person remitting the same became a bankrupt, or had committed any act of bankruptcy; or whether, receiving the bills as a part of the general fund, he was now bound to throw them into the common stock, and be accountable to the assignees of the bankrupt, and come in of course as a common creditor. In my opinion, as no act of bankruptcy had been proved before the remitting of the bills, the appellant was entitled to set them off against the debt due to himself, and I therefore move that the interlocutor complained of be reversed.”

It was ordered and adjudged that the interlocutor of 2d March 1774 be affirmed, and the interlocutor of 17th February 1775 be *reversed*; and that the appellant's defence be sustained.

For Appellant, *Henry Dundas, Ja. Wallace.*

For Respondents, *Al. Wedderburn, Gilb. Elliot.*

Unreported in Court of Session.

JOHN McDOWAL, Merchant in Glasgow, and }  
ALEXANDER GRAY, W.S. Edinburgh, } *Appellants;*  
ANNAND and COLHOUN's ASSIGNEES, Merchants, *Respondents.*

House of Lords, 26th February 1776.

**GUARANTEE—RELIEF—ARRESTMENT—TRUST—PROOF—OATH OF BANKRUPT.**—Two parties became guarantee for a company, on the latter depositing bills due to them in their hands as a security. This was done, and a list of the bills drawn out and handed over, and a receipt granted by the guarantees. They were immediately delivered to one of the partners of the company, who discounted and used some of them for company purposes. Held, on failure of the company, that the guarantees, though they had thus parted with

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possession, were to be preferred to an arresting creditor. The oath of one of the bankrupts of the company allowed to be taken to prove that he had the bills returned to him, not for behoof of the company, but in trust for the guarantees.

Mr. Ebenezer M'Cullock and George Young carried on business as merchants in Edinburgh, under the firm of Ebenezer M'Cullock and Company.

The appellant, M'Dowall, was married to M'Cullock's daughter, and Mr. Gray was the professional agent of the company.

In 1768, M'Cullock and Young were in difficulties for want of money to carry on their business; and, with the view of supporting their credit, they resorted to the plan of drawing and circulating bills, and proposed to M'Dowall and Gray, in the following letter from M'Cullock to the former, that they should be guarantees for the company: "Mr.

" Young and I will have some £3000 or £4000 to meet, and  
 " for which, without discounting bills, we cannot make cer-  
 " tain provision, unless we are at liberty to value upon Lon-  
 " don, and then it is customary to give a letter of credit. I  
 " wish to be in a capacity in either shape, and therefore  
 " would propose to ask the favour of you and my friend  
 " Alexander Gray, writer to the Signet, to give such a let-  
 " ter of credit in our favour to the house of Malcolm, Hamil-  
 " ton and Company, London, to the amount of £3000 and  
 " 4000. And, for your and Mr. Gray's security, *I shall put*  
 " *an equal value in bills due to Mr. Young and me, (but*  
 " *at long dates,) into Mr. Gray's hands for your security.*"

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In answer to this, Mr. M'Dowal wrote:—" If it can be of  
 " any service I am willing; and shall be satisfied with Mr.  
 " Alexander Gray's taking the needful from you and Mr.  
 " Young to make us safe." And the following letter was

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addressed and signed by both:—" To Messrs. Malcolm, Ha-  
 " milton and Co. Gentlemen,—Messrs. Ebenezer M'Cul-  
 " lock and Company have been, and are still, in the course  
 " of holding with your house an exchange account, by draw-  
 " ing bills and making remittances from time to time, as they  
 " have occasion, we, John M'Dowal, merchant in Glasgow,  
 " and Alexander Gray, writer to the Signet, do hereby  
 " oblige ourselves to see you duly reimbursed for such bills  
 " as these gentlemen have already drawn, or may have oc-  
 " casion to draw, to the extent of £5000 sterling. We are,"  
 "&c.

A parcel of bills was then brought, along with a particular list thereof, the names by whom due, the dates and time when payable. In this list were two bills, one due by James Murray, for £206. The other by D. M'Ilmun for £708; and another by same party, for £934. At the bottom of this list there was an acknowledgment signed by Gray, that the above bills in the list, sixteen in number, were lodged with him "in security of relief from the effect of a letter of credit subscribed by me and John M'Dowal, amount £5050."

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These bills, however, were given back to Young, that he might keep them as trustee for Gray, and some of their contents were thereafter uplifted and appropriated in carrying on the company business by Young, with whom they were so deposited.

In December 1769, McCullock and Company stopped payment, and the respondents, Annand and Colhoun, being creditors of the company in £6000, were involved and made bankrupts by that failure. They had previously used arrestments in the hands of McCullock and Company's debtors, to secure as much as they could, and among the sums attached by their arrestments, were the sum due by D. M'Ilmun of £879. 5s. 7d.—And the sum of £63, being the balance of the bill due to the company by James Murray of Leith, both mentioned in the above list.

The appellants, Gray and M'Dowal, also arrested for relief of their guarantee; but seeing that they had no chance, in virtue of the arrestment, the respondents being prior in date, they claimed to be preferred to these two bills, on the ground that they were transferred to the appellants, Gray and M'Dowal, in security of their letter of guarantee, conform to the list and docquet above referred to. A competition thus arose in an action brought for the purpose, and a proof being allowed of the facts, it appeared that the bills were placed in the hands of Gray as a security, and afterwards returned by him to Young, to be kept by him, not in the company's counting house, but at his own house, in a particular repository, under the care of Mackie, a clerk, who had the key, and access to which was not allowed to the company. They were tied up by themselves, and backed, "Note of bills deposited with Mr. Alex. Gray." The company had also a receipt signed by Mr. Gray, as having received those bills in security, and which receipt was put up along with the company's bills—that when the company were greatly pressed for want of money, Young yielded with

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— reluctance to use one of the bills deposited with Gray, by getting it discounted; “declaring in the presence of the M'DOWAL, &c. “ clerk, that he was doing an exceeding wrong and blameable thing, which nothing but necessity could force him to, and hoped that he should be able to replace the bill.” Among the witnesses examined by the appellants was George Young, one of the bankrupt partners of M'Culloch & Co.; and to whom objection was taken as incompetent; but his evidence was allowed, under reservation of the objection.

Aug. 5, 1774. The Lords, of this date, found “that Messrs. Annand and Colhoun, and their assignees, have the preferable right to the sums in question, and therefore grant warrant to, and ordain the factor to pay the same to them and their attorney accordingly, with such interest as shall be due thereon, in terms of his factory, and decern;” and, on reclaiming petition, the Court adhered.

Jan. 18, 1775. Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—The condition of the appellants' becoming guarantee for M'Culloch and Company to Malcolm, Hamilton and Company, was, that M'Culloch and Company should lodge or deposit, in Gray's hands, for their mutual security, bills equal in amount to the letter of credit they gave, so that they might operate their relief against these in case M'Culloch and Company failed to pay. They gave a letter of credit for £5000, in terms of M'Culloch's request, on the condition stipulated. This condition was complied with, and bills to the amount of £5050, due to M'Culloch and Company, but drawn at long dates, were handed to Gray “*in security of relief from the effect of a letter of credit,*” as the receipt expressly bore, besides further setting forth that “on your relieving us of that engagement, we are to return you the above bills.” So ran the receipt signed by Gray and M'Dowal, and such was the nature of the transaction between the parties. Looking, therefore, to the circumstances of the transaction, proved beyond all doubt—the treaty for depositing the bills—the indorsement and actual delivery of the bills to Gray by Ebenezer M'Culloch and Company—his granting a receipt for the same, setting forth that he held them in *security of relief from the effect of a letter of credit* granted by the appellants—the delivery of these bills by Gray to George Young, to be kept by him for the use and security of the appellants—the lodging of these by Young in his own private cus-

tody, that is, in his own private repository in his dwelling house, separate and at a distance from the company's counting house and effects—his constantly keeping the bills for the appellants, are all so many incontrovertible proofs of what the parties meant to do, and what they actually did, as clearly to demonstrate that the bills having been delivered to Gray by M'Cullock and Company, were lodged by him with George Young as a trustee for the appellants. Nor does it alter their right over them, that Mr. George Young did what he had no right to do, and what he knew was a great wrong, to take any one of these bills and discount it for his own use. This was a misappropriation of that over which another had, in the meantime, entire right and control. But, in truth, had George Young taken and applied the whole to his own proper or private use; or had failed duly to negotiate them, the loss must have fallen on the appellants, because they had granted their receipt and obligation to M'Cullock and Company to return these bills to them. If, therefore, his interest in those bills was a good interest as a security, and the possession held by Young as his trustee, a good possession, so as to subject him to such risks and responsibility: by parity of reasoning, he ought to be allowed to keep that interest and to protect that possession. The Court of Session have gone on the principle that George Young, in a company transaction, could not act as an individual, because, in the eye of law, he was to be viewed so incorporated with the company as to be incapable of performing any company transaction but for behoof of the company, and therefore these bills, being company bills, were to be presumed deposited with him for behoof and on account of the company. But this reasoning is fallacious, and contrary to the whole proved facts of the case, which clearly prove Young to have acted as a trustee for Gray, in holding these bills. This is established by the parole proof adduced, which, in the circumstances of the case, was quite competent. It was also quite competent for the Court to order the evidence of George Young to be taken; while it is clear, on the other hand, the judgment of the Court below on this point was acquiesced in by the respondents; and as they have brought no appeal of these interlocutors, they are final and conclusive.

*Pleaded for the Respondent.*—The tendency of what the appellant contends for in this case, would be to open a door

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for the grossest frauds.—The present is just an instance of a secret lien. It is admitted, that if there were any indorsements upon the bills, it was in blank, and that Gray had them only in his hand for a moment. He left them therefore with Young. But whatever were the appellants' intentions, and M'Cullock's understanding, the pledge, if such was so intended, was incomplete and ineffectual in law. The pledge was not completed by possession or transference of the custody. Possession of the thing pledged in security, was essential to the completion of the transaction. In order to transfer a bill, either absolutely or by way of security, two things were necessary, an indorsation and delivery of the bill. A transference, *retenta possessione* is not valid in law. And even though the intention had been to create a trust, yet, for the same reason, law could not support it in such circumstances. A trust in the *assignor* for the *assignee*, is just another name for *retenta possessio*; and delivering the bills to Young was no other than giving them back to the company. The appellants' proof by witnesses, by which they endeavoured to establish the trust in Young, was not competent. The Scotch statute 1696 declares, that a trust shall not be proved, but by the writing of the trustee, or reference to the oath of party. There was no writing; and Young was only examined as a witness, not as a party. It was not a reference to his oath, nor could there be such a reference, as he was no party interested. Proof by his oath was therefore as much a breach of the statute, as the examination of the other witnesses in regard to the trust. It was incompetent to allow parole proof, as had been done, of such trust, especially in regard to bills, that *ex facie* stand purged of all such qualifications; and it would be a plain perversion of the nature and legal character of bills, were such proof admitted. It was further incompetent to allow Gorge Young the bankrupt to be examined, because "a bankrupt's oath cannot be admitted in prejudice of his creditors." It is upon the deposition of Young that the parole proof of this trust rests. If, therefore, parole be incompetent to establish a trust; and if the witness brought to establish it be otherwise incompetent; nay, further, if his oath be the oath of a bankrupt, given against his creditors, then the whole case fails.

Bank, vol. 2, p. 657.  
Ersk. Inst. p. 669.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the 5th of August 1774, and 18th January 1775, complained of, be reversed, and that the interlocutor of the 7th of De-

cember 1774 also complained of be affirmed ; and it is declared, that the appellants, Alexander Gray, writer to the Signet, and John M'Dowal, merchant in Glasgow, have the preferable right to the bills in question.

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For Appellants, *E. Thurlow, Ja. Wallace.*

For Respondents, *Al. Wedderburn, Alex. Murray, Ar. Macdonald.*

Unreported in the Court of Session.

MUNRO Ross of Pitcalny, Esq. - *Appellant.*

CAPTAIN JOHN LOCKHART Ross, - *Respondent.*

House of Lords, 9th May 1776.

**DEEDS CHALLENGED—FRAUD AND INCAPACITY—PRESCRIPTION.—**

Four several deeds were executed at intervals, conveying an estate to different parties, other than the heirs of investiture, and challenged on the head of incapacity, fraud, and circumvention.— Held the deeds irreducible, as there was no conclusive proof of incapacity, fraud, or circumvention. Held also prescription not to apply, so as to exclude the action.

This was an action of reduction, originally brought by the appellant's father, Alexander Ross of Pitcalny, for setting aside four several deeds, executed between 1685 and 1711, by David Ross, Esq. of Balnagowan, whereby that estate, which would have descended to the said Alexander, by the previous investitures, was conveyed away to strangers. The grounds of reduction were, fraud, circumvention, and incapacity of the grantor.

The investitures of the estate of Balnagowan, for several centuries, had stood devised to *heirs male*. By charter from the crown 1615, it stood limited to George Ross, then of Balnagowan, and the heirs male of his body ; whom failing, to David Ross of Pitcalny, the appellant's ancestor, and the heirs male of his body ; whom failing, to Ross of Invercharron, and others, the next collateral heirs male, in their order ; whom all failing, to the nearest heir male in general of the said George Ross.

The above George died in 1615, leaving issue a son,

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David, the *first* of that name, who died in 1620, leaving issue a son, David, the second of that name, who died in 1657. This last David Ross married Lady Anne Stewart, a daughter of the Earl of Moray; he was infest in the estate under the above investiture in fee simple, and it is his four deeds which are now under challenge. He died without issue in April 1711, whereby the appellant's father, Alexander Ross, his lineal descendant and heir male, was entitled to succeed.

It was averred by the appellant, that Balnagowan was then worth £1000 per annum, and that there were on the estate valuable woods, worth a large sum. The whole debus against it amounting to £9000.

The first deed under challenge was executed in 1685, and was of the nature of an entail, which limited his own right in the estate of Balnagowan, from a fee to that of a mere liferent, and conveyed the fee to Francis Stewart, youngest son of the Earl of Moray, whom failing, to the heirs male of the body of Lady Anne, *by any other marriage*; and to certain other substitutes. This deed bore the appearance of a purchase, a price being mentioned, although none was paid; but the deed bore to be redeemable within two years by the heirs of Balnagowan's body; and if not redeemed within that time by them, the right of redemption was to be foreclosed, even against infants.

The second deed had been executed after he had come to relent, and consider calmly the nature of the former. But though a change had come over him, it was alleged to have been induced by the same sort of undue influence, though in favour of a different party, who had acquired a greater ascendancy over him. Accordingly, Francis Stewart, conscious how precarious his title was under the first deed, and apparently after a price paid to him, had little objections to give his consent to a new conveyance of Balnagowan, by a deed executed by David Ross and him jointly, in favour of Lord Ross,—a nobleman who was a mere stranger to Balnagowan, whom he had merely met by accident, and whose only convection or recommendation was, that he bore the same name. This deed likewise bore value given, and was taken to the heirs male of Lord Ross, whom failing, to such persons as the said David Ross should, by deed or writing, appoint.

The third deed was in the same terms, but contained an

extension of the substitution in favour of Lord Ross' heirs, and to the prejudice of Balnagowan's own heirs. This deed also contained an assignation to the remaining wood on the estate.

The fourth deed, executed in 1711 by *Balnagowan* and Lord Ross *together*, conveyed this estate to General Ross, Lord Ross' brother, in fee simple, but for a sum of £5550, to be paid by the General to his brother Lord Ross, but nothing to Balnagowan.

Balnagowan had at this time a pension of £200, which had been allowed to accumulate. He had also, by contract, sold part of his woods for £5000, under deduction of £2333 for expense of cutting and transplanting, and these were assigned to Lord Ross, who granted a discharge, binding himself to apply them in extinguishing David Ross' debts. The other part of the wood had already been conveyed to him in the deed of 1707.

The first deed was impeached, on the head of fraud and circumvention; it being alleged that undue influence was used by his wife and her father and brother, who represented to him the prospect of their obtaining him a peerage. The second, third, and fourth deeds, were executed under the same undue influence exercised over him by his wife—her chaplain William Stewart, and others,—the great idea held out being, to see his name, his arms, and his estate, merge once more in a peerage. And all of them were executed when the grantor was labouring under weakness and incapacity of mind. On the third deed, infestment never passed; and the fourth was executed on death-bed, and was undelivered at the time of his death. For the three last deeds, the only money which Balnagowan got was, as shewn by the correspondence, £55. 11s. 2d. In order to try the question, and to challenge these deeds, a bond was granted by the appellant's father to a trustee, who led adjudication against him, as charged to enter heir to David Ross the third of Balnagowan; and David Ross the second of Balnagowan; and David Ross, the first of Balnagowan; and to George Ross of Balnagowan. In defence, objections were stated to this title, which were sustained, but held the action good under the charter of Bishop Ross to David Ross in 1667, conveying the lands to him and his heirs-male, and repelled the plea of prescription.

A proof was allowed, and, when completed, was reported

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to the Court, and a debate had on the import thereof. It was contended by the appellant, that there was intrinsic evidence of undue influence and fraud, from the nature of the deeds,—their bearing a price when no price was paid. A great many witnesses proved that he was weak and under the influence of his wife—that it was a general report this. None, however, spoke distinctly to their own knowledge of the fact, and to any circumstance indicating it. Few had personal knowledge of him, and some even spoke to his good understanding. On the other hand, the respondent produced 200 and 300 letters written by him, exhibiting an intelligence in his affairs, that might be compared to any of that period. He was, besides, sheriff of the county of Ross. He also was member for the same county in Parliament in the years 1669, 1670, and 1672; and in 1689 he was appointed head sheriff, which he kept till the year 1703. He was also one of the Commissioners of Justiciary for one of the northern districts. He was also governor of Inverness in 1689. His letters, too, were as good in point of intelligence, as his correspondent, the Earl of Moray, then Secretary of State.

The Court of Session, after hearing counsel for six days, July 25, 1761. repelled “the reasons of reduction of the deeds quarrelled, Feb. 26, 1762. June 22, — “assoilzie the defender, and decern.” On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords, and cross appeal for the respondents, in so far as the interlocutor 5th February 1740 repelled the plea of prescription.

*Pleaded for the Appellant.*—That the deeds sought to be reduced were procured from a weak man, by undue influence, combination, and fraud, is demonstrated, not only from the intrinsic evidence which the deeds themselves afford, as most irrational, absurd, and to the hurt and prejudice of the grantor, but also from the parole and other proof adduced, indicating, in the clearest manner, undue means used in order to procure the execution of the deeds in question. The fact, that deeds are executed in favour of mere strangers, to the prejudice of the party's own heirs, elicits enquiry into the motive and the manner of granting. And this enquiry is always the more necessary, and such deeds liable to greater suspicion, in proportion as the grantor has been of weak mind and capacity. If entirely capacitated, and of sound understanding, law will support settlements, however arbi-

trary, fanciful, or disadvantageous ; but when the grantor is proved, as in this case, to be of weak capacity, law does not bestow on such deeds the same indulgence, and therefore will give redress where parties in such circumstances have been deceived into the execution of ruinous and improper deeds. Facility and enormous lesion infer circumvention, and where lesion and facility concur, slender proof of fraud will be sufficient. The whole transactions which these deeds disclose, display the weakest capacity in the grantor, and, on no other supposition than this, can they be supposed to exist. The deeds bore a price, and no price was paid ; and though stript of his estate, he still continued liable for £9000 of debts, without making the payment of these debts a condition or burden on the conveyance. This intrinsic evidence is corroborated by parole testimony of witnesses. The artful means used in obtaining them ; the subtilty and address of those agents used to influence him, are clearly shewn from the letters produced. Not only his estate, but his pension, his woods, his future acquisitions, and even the nominal dignity which he supposed himself to have right to, were also swept from him. But, separately, the deed 1711 was liable to other objections. It was never a delivered deed, nor completed in the grantor's lifetime, and it was further reducible on the head of death-bed. It bore a price not even adequate to the value of the woods on the estate. And, in regard to the cross appeal against the interlocutor repelling the plea of prescription, the same ought, on the ground of minority and *non valens agere*, to be adhered to.

*Pleaded for the Respondent.*—A reduction of so many deeds of settlement brought *post tantum temporis* must require a stronger degree of proof than if brought *de recenti*. They are almost a century old, and many circumstances which have escaped the knowledge of the present age may have been clear transactions at the time they were executed. The proof of weakness and incapacity have entirely failed. His numerous letters produced, show how he wrote and thought of the events of the period, and his own affairs, and in no degree betray want of intelligence or vigour of understanding. He was considered worthy of the most important offices. He was member of Parliament for his own county. He was head or principal Sheriff of the county. He was Commissioner of Justiciary ; and, during a stirring period, and when the country was undergoing a change of govern-

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ment, he was appointed Governor of Inverness. These facts are totally inconsistent with the supposition of his being a weak man. The evidence adduced by witnesses on the other hand, to prove his weakness, is almost entirely of the nature of secondary evidence. The witnesses speak from hearsay; and those who pretend to have been acquainted with him personally, can give no satisfactory reason why they thought him weak. They refer to no particular circumstance to indicate this. There is no proof of any falsehood, any deceit, any fraud or circumvention; and the arts alluded to, and spoken of, are only conjured up by a suspicious mind. It was not very likely that his wife would join strangers, to cozen and cheat her own husband out of every thing he had in the world, so that her machinations with Stewart the clergyman, &c., disappear as incredible. The rationality of the deeds are accounted for at first. He wished his name and estate to be merged in a peerage. This may have been a vain desire, but it was a desire he was entitled to gratify; and however fanciful this may have been, and however injurious to third parties, law cannot question the right of the owner to settle his estate in any way he pleases. On the cross appeal, the appellant's ancestors being cut out by the settlement 1685, in consequence whereof Mr. Francis Stewart was infest in the fee of the estate, the action brought by the appellant's father in the year 1738 was barred, both by the positive and negative prescription, the estate having been possessed under that deed and subsequent deeds more than 50 years before any challenge was brought.

After hearing counsel, it was  
 Ordered and adjudged that the said interlocutors com-  
 plained of be affirmed.

For Appellant, *E. Thurlow, Ilay Campbell, J. Dunning,*  
*R. Macdonall.*

For Respondent, *Henry Dundas, Al. Wedderburn, Alex.*  
*Murray, Alex. Wight.*

This branch of the case not reported in Court of Session. First  
 branch reported Elchies, " Fraud," No. 9.

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[M. App. "Fraud," No. 3.]

CAMPBELL, ROBERTSON & Co., Merchants,  
Glasgow, - - - - } *Appellants;*  
WILLIAM SHEPHERD of London, Merchant;  
and ALEXR. and SAMUEL PATERSON, his  
Mandatories, - - - - } *Respondents.*

CAMPBELL, &c.  
v.  
SHEPHERD, &c.

House of Lords, 8th Nov. 1776.

**SALE—INSOLVENCY—ARRESTING CREDITORS.**—A party absconded from Glasgow, came to London, purchased cotton from merchants there, to whom he was a stranger, representing himself as a merchant in Glasgow in good credit, and giving references to certain parties in London, who, by previous arrangement with the buyer, spoke favourably of his credit, and induced the seller to give the cottons. Held, on proof of his insolvency, that the sale was void, and the seller entitled to reclaim his goods while *in medio*, and to be preferred to the creditors of the buyer arresting.

Vallance, a merchant in Glasgow, came to London and purchased cotton from the respondent, Shepherd. He was a stranger to the latter, but, from the assurances from two of his countrymen, and the captain of the vessel in which he had come to London, who, it afterwards turned out, he had previously engaged to speak favourably as to his good credit and responsibility, 35 bales of cotton were sold to him, amounting in value to £504. 18s. 3d., which, by Vallance's desire, was shipped, not to Glasgow, but to Leith. The respondent at sametime wrote to a gentleman in Glasgow enquiring into his circumstances—he, in the meantime, drawing the bill of lading in his own name, but indorsing it to Vallance. When the goods arrived in Leith, they were, with the exception of 6 bales, allowed to lie in Leith, and afterwards removed to the house of Scott, near Edinburgh.

The answer to the respondent's letter of enquiry from Glasgow was, that Vallance was a bankrupt, and had absconded some weeks ago, none knew where, whereupon Shepherd reclaimed the goods as his, and applied to the sheriff of Edinburgh for warrant to have them removed out of the hands of Scott, and put under the orders and custody of the sheriff. The sheriff granted warrant accordingly, and ordered them to be taken to the city Weigh-house, under the charge of Falconer. In removing under this warrant, the cotton was arrested in Scott's hands, and also in Falconer's, by the appellants, creditors of Vallance, for a debt of

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£17, who brought a forthcoming, and contended that the property of the goods having been transferred to Vallance, their arrestment was preferable. To this it was answered, that the cottons were fraudulently obtained,—that Vallance had induced people in London to come forward to speak to his credit, while he well knew he had absconded, and was insolvent; that the property had been reclaimed, and was now the respondent's. The sheriff held the cotton for them, and Falconer for the sheriff. Falconer was, therefore, not an arrestee—nor were the goods in his possession at the time of the arrestment.

On proof, the imposition on the respondent in London was clearly established, and it was also proved that he had left Glasgow in secrecy, and without telling any one where he had gone, while diligence was out against him; and the common report was, he had absconded.

June 28, 1775. The Lords pronounced this interlocutor: "Prefer William Shepherd to the price of the cotton still *in medio*; but, in respect the same was sold by authority of this Court, not reclaimed against by Shepherd, find it not now competent to him to claim any damage on that account, and remit to the Ordinary to proceed accordingly: Find Campbell, Robertson and Co. liable to Shepherd in the expense of process incurred after the date of the condescension given in for them in February, on which the proof pro-ceeded." On reclaiming petition the Court adhered.

July 14, 1775. Against these interlocutors an appeal was brought to the House of Lords; and a cross appeal, in so far as it did not allow damage for the loss in price attending the public auction of the cotton by order of the sheriff, at a disadvantageous time and place, and also in so far as it did not find the respondents entitled to the full costs.

*Pleaded for the Appellants.*—There is no law for rescinding sales, merely because the seller has thought his customer in better credit than he actually turns out to be. And any alarm spreading among his creditors, at the moment of sale, cannot affect the rights of parties in that sale. The law is, that if the goods be not paid, and insolvency intervene, the seller may stop *in transitu*. But if the goods be delivered, the property is then passed, and the seller becomes one among the buyer's creditors, and shares the common fate. In this case, the transit was at an end—delivery was complete; they were received into the buyer's warehouse, part of the

bales of cotton were resold by him, and the property therefore passed. Besides, from the proof, there was no fraud practised on Shepherd. The mere fact of his buying, even in difficult and doubtful circumstances, does not prove such ; and he made no false promises or statements in regard to these to him. As, therefore, Vallance was not incapacitated from buying, even supposing his circumstances doubtful, Shepherd's confidence in him, in delivering these goods before writing to Glasgow, could, and ought not to affect that completed delivery and sale. If the sale is completed by delivery, then the appellants' arrestment must take effect as against the property of their debtor.

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*Pleaded for the Respondents.*—The rule in the law of Scotland, “ Dolus dans causam contractui reddit contractum nullum,” must govern this case. Fraud was apparent in the whole transaction. As is laid down by Ersk. B. 3. T. 3. § 8. ; “ Delivery in sale ubi debis dedit causam contractui ex. “ gra. where the buyer knew himself insolvent, has not the “ effect to transfer the property, it remains with the seller “ who was engnared into the bargain, and the contract be- “ comes void.” In the present case, Vallance bought the goods under a false representation as to his credit. He got persons in London to speak to his good credit, and passed himself off as such, while he knew well he was insolvent, and concealed the fact, that he had clandestinely absconded from Glasgow in order to avoid diligence. These facts being established by proof, are sufficient in law to void the sale. In law, insolvency may not *per se* be sufficient to annul a sale ; but, if added to that insolvency, there be fraud and imposition practised in effecting it, inducing the vendor to sell as to a person of undoubted and substantial credit, while the vendee fraudulently conceals his real circumstances, and resorts to fraudulent means, as in this case, to induce others to speak well of his credit, in order to obtain the goods from the vendor, the contract of sale is resolved, and the goods, though delivered, remain the property of the buyer. As they were sold at a great sacrifice of price, by public auction, and when the market was low and no demand, the respondents are clearly entitled to damage for the loss so sustained.

After hearing counsel :

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**LORD MANSFIELD** stated :—

**CAMPBELL, &c.** *v.* **SHEPHERD, &c.** “The difference between attachments in Scotland, and the *legal* operation of the bankrupt laws in England is this,—In the former, the creditor, who by his diligence, was able to seize first, was invested with the property so seized exclusively, to the amount of his demand; while the bankrupt laws of England, framed upon a more equitable construction, let in all the creditors to an equal portion of the bankrupt's effects; and, to prevent the possibility of fraud or collusion, by giving an undue preference of one creditor to another, in the distribution of the effects, strict regard was had to the date of the first act of bankruptcy. Thus, for instance, if a man had committed some private act, which in law would make him a bankrupt, and was willing to favour a particular friend, and accordingly paid him his whole debt, and then publicly became a bankrupt, yet if the previous private act should be afterwards discovered, the favoured creditor would be obliged to refund for the benefit of the estate, and be compelled to come in for no more than an equal share. In like manner, when a bankrupt makes a purchase after bankruptcy, in circumstances which prove not only concealment, but fraud, the seller, who is ignorant of such bankruptcy, ought not to be deprived from vindicating these goods against the claim of the bankrupt's creditor, so as to prevent them from becoming a part of the estate for general distribution. In such case, the arrestment of the bankrupt's creditors could not attach.” Moved to affirm.

Ordered and adjudged that the interlocutor complained of be affirmed, and that the appellants in the original appeal do pay the respondent, William Shepherd, £100 costs.

For Appellants, *Ja. Wallace, Ar. Macdonald.*

For respondents, *E. Thurlow, Henry Dundas, Al. W-*  
*derburn.*

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JEAN ALLAN, and DONALD SMITH, her Husband, *Appellants* ;  
 ARTHUR SINCLAIR, Esq., and ISAAC GRANT, }  
 W. S., his Attorney, - - - } *Respondents.*

ALLAN, &c.  
v.  
SINCLAIR.

House of Lords, 13th Nov. 1776.

**DEED—IMPLIED REVOCATION—ERROR IN PROCEDURE.**—A party executed a deed, conveying his whole heritable and moveable estate to his four sisters and their heirs-male, according to certain proportions, in 1764, reserving power to revoke, but declaring it to be good in so far as not revoked. He afterwards married, and in 1766 executed a new deed, conveying his whole heritable and moveable estate to the heirs of his own body, of that marriage. There was no revocation of the first deed. He thereafter died, leaving a son, who only survived his father three months: Held, on failure of his issue, that the first deed remained good; and as there was no implied revocation of it by what was done, and no express revocation, the same was to be read as if it had within it the deed of 1776, and so excluded the heirs-at-law as such. Question, Whether proceedings were correct in Court below? *Vide Note at end of case.*

Captain James Allan, then unmarried, executed in 1764 a settlement, (which appears to have superseded a previous deed executed in 1748,) conveying his real and personal estate, then belonging, or which might belong to him at the time of his death, to and in favour of himself, and the heirs whatsoever of his body, whom failing, to his four sisters (he having no brother) according to the following division:—  
 1st, To his eldest sister, Margaret, in liferent, and his nephew and nieces, children of his younger sisters, in fee, all and whole an heritable bond for £800 on the lands of Malsetter; 2d, To the appellant, his second sister, Jean, in liferent, and to her eldest son, and the heirs-male of his body, whom failing, to her next son, Frazer Smith, and the heirs-male of his body, all and whole the lands of Walls and Hoy; 3d, To the youngest sister, Anne Allan *alias* Sinclair, in liferent, and to her three sons, Arthur, the respondent, James and Benjamin Sinclairs, according to their seniority, and to the heirs-male of their bodies, in the same order, his lands and estate of Campston in Orkney, and as also adjudication and infestment upon the estate of Sabay, with whatever he might acquire to the said estate; 4th, To his youngest sister he gave the whole personal estate in liferent, and to her three sons in fee.

In the deed there was a power to revoke; but declaring,

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"so far as not revoked or altered, by a writ under my hand, the same was to be held as a valid and delivered deed."

Thereafter Captain Allan married, and, of this date, executed a new settlement of his whole heritable and moveable estate, whereby, after binding himself to provide his wife a liferent annuity out of the lands, he also binds and obliges himself to dispone the same in favour of the eldest son of the marriage, and to burden him with suitable provisions to the other children of the marriage.

The deed contains no revocation of the one executed in favour of the sisters in 1764; and Captain Allan dying in autumn 1767, leaving one child, a son, of the second marriage, who died a few months thereafter.

Upon this event, the appellant, Jean, was advised that the succession to the heritable estate of her brother and nephews did of right belong to their heirs-at-law, in respect that the instrument executed by Captain Allan, in the form of a will in 1748, was countermanded, and put an end to by the disposition and settlement made by him in 1764; and that of 1764 was superseded and put an end to by his last disposition and settlement made in 1766; and as by this last deed he had not made any substitution of heirs who should take on failure of his own issue, so, upon failure thereof, by the death of his son, the succession devolved of course on his heirs-at-law. Subsequent to the execution of the deed 1764, he sold the lands of Walls and Hoy conveyed by it. The question, therefore, came to be, Whether the first deed of 1764 was virtually revoked by Captain Allan's subsequent marriage, and his subsequent disposition of 1766? Upon the latter supposition, the sisters would come in equally as heirs-portioners of their brother, without regard to the division in the first deed 1764. Acting on this supposition, they proceeded to serve themselves in that character, when the respondent, the eldest son of his third sister, to whom by that deed the fee of the estate of Campston was disposed, raised the present action of reduction and declarator, contending, that the first and second deeds were not inconsistent, and that revocation was not to be implied.

The Lord Ordinary (Auchinleck) pronounced this interlocutor:—“ Finds, that as Captain Allan's settlement of his affairs in 1764 appears, from the conception of it, to have been intended to fix the succession to him in all different events; his subjects being provided, first, to the heirs of

" his own body ; and failing these, to the other heirs and  
 " persons therein mentioned, with a proviso, that notwithstanding  
 " standing power of alteration is reserved, yet so far as not  
 " revoked and altered by a writ under his hand, it is de-  
 " clared to continue valid, and though the Captain, in the  
 " year after his marriage, made a new deed for regulating  
 " his succession among the descendants of his own body, but  
 " which goes no further, and contains no revocation of the  
 " former settlement in favour of the heirs called thereby  
 " after the heirs of his own body ; finds that the case is the  
 " same as if the settlement 1764 had contained in it the  
 " settlement 1766, which is in no way incompatible with it;  
 " and that therefore the pursuer is entitled to take the suc-  
 " cession provided to him by the deed 1764, in the same way  
 " as if the deed 1766 had not been executed."

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On two representations the Lord Ordinary adhered ; and Nov. 15 & 27,  
 on reclaiming petition to the Court, the Lords adhered. 1773.  
 The action then went back to the Lord Ordinary, where-  
 upon the respondent moved, by minute, to apply the judg-  
 ment pronounced, by giving decree in terms of the other  
 conclusions of the action. These conclusions were, to have  
 it found and declared, that the property of the lands of  
 Campston, together with the heritable rights which Captain  
 Allan had upon the lands of Saba, did now belong to the  
 respondent, who, by the death of his two brothers without  
 lawful issue, had right to their shares of the heritable bond  
 of £800 due by Benjamin Moodie, and to the property or  
 other right which the said Captain Allan had to the lands of  
 Hamiger, and whole progress of writings relative thereto,  
 and rents of the lands since the death of Captain Allan.  
 And that the said Anne Allan, the respondent's mother, and  
 his two brothers, being all now dead, the respondent was  
 the sole remaining executor of the Captain, and had the right  
 to his executry, or personal estate, wherever situated; and, as  
 one of the four heirs-portioners of the said Captain Allan,  
 had also right to a fourth part of the lands of Oversanda, and  
 any other lands or heritable subjects acquired by the Cap-  
 tain posterior to the settlement. And these things being so  
 found and declared, the foresaid special service of the ap-  
 pellant and others ought to be reduced, as heirs-portioners  
 to Captain Allan.

Jan. 18, 1774.

Counsel for the appellants not objecting, the Lord Ordin-  
 ary pronounced the following interlocutor :—“ Having con-  
 sidered the above minute and libel referred to, decerns Feb. 22, 1774.

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" and declares in terms thereof, so far as not determined by  
 " the interlocutor of 16th July last; and, in respect the writ-  
 " ings called for to be reduced, are not produced, reduces,  
 " decerns, and declares, as to them, *contra non producta*."

The appellants gave in a representation against this interlocutor, setting forth, that they had not intromitted with the rents, and praying further time to be heard as to the other conclusions; but the Lord Ordinary pronounced this interlocutor:—" Having heard parties, makes avizandum to  
 " himself with respect to the execruty funds in England;  
 " but finds the pursuer entitled to the execruty funds and  
 " whole moveables in Scotland; and ordains the defenders  
 " to give in an account of these funds on or before the 12th  
 " Nov. next: Finds, also, that the pursuer (respondent) has the  
 " sole and absolute right to Captain Allan's claims upon  
 " the estate of Sabay, and likewise to the heritable bond of  
 " £800 sterling due by Benjamin Moodie of Milsetter to  
 " the Captain; and whatever right was in the Captain to  
 " the lands of Hamiger; and also to the fourth part of the  
 " lands of Oversanda; and finds, that he has also right to  
 " the whole progress of writs and title-deeds conceived in  
 " the Captain's favour; and ordains the defender to lodge  
 " these title-deeds in the hands of the clerk, at the expense  
 " of the pursuer, and that on or before the 12th November  
 " next, with certification that if they are not then lodged,  
 " the Lord Ordinary will not allow them to be afterwards  
 " received, without inflicting a proper demand upon the de-  
 " fenders."

July 26, 1774.

The appellants again presented a representation, contending that the respondent had no right to the whole bond of £800, but only to a part of it. The Lord Ordinary pronounced this intelorcutor:—" Finds that Arthur Sinclair has  
 " the sole and absolute right to the lands and estate of  
 " Campston, lying in the parish of St. Andrews, upon the  
 " main land of Orkney; and restricts the sum due to the  
 " pursuer in the £800 to the share which belonged to his  
 " deceased brothers, James and Benjamin Sinclairs, with  
 " these variations refuse the desire of the representation."

July 26, 1775.  
Aug. 2, 1775.

The respondent moved, that the appellants produce the title-deeds; and, on failure to do so, the Lord Ordinary, "in  
 " respect the defenders have not obtempered the above in-  
 " terlocutors, decerned against them in terms of the libel.  
 " On representation, the Lord Ordinary adhered."

The present appeal was brought against the interlocutors

of 16th July, 13th and 27th November, 1773; interlocutor of the Lords, 18th January 1774; interlocutor of Lord Ordinary, 22d February, 5th and 26th July, 1774; 26th July and 2d August, 1775.

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*Pleaded for the Appellants.*—1. Every settlement of a man's succession is, by the law of Scotland, revokable at pleasure. The deed 1764 was, in its own nature, revokable, and might have been so revoked or altered, although no reserved power to do so had been expressly declared in the deed itself. The deed 1764 was intended to take effect only in an event which has not happened, namely, the death of Captain Allan without leaving any child. But, as he afterwards married, and made a new settlement of his whole succession upon his wife and children, and as he had a son of this marriage, who survived him, the effect of the deed must be limited to the non-existence of children, and not by their failure through death. Supposing no second deed had been executed, yet the existence of issue of his body would have virtually put an end to the deed 1774, upon the principle *si sine liberis decesserit* alone, without the necessity of any express revocation; and if this be law, then, on the birth of issue, the first deed was thereby destroyed. Hence, therefore, the reason and the cause why the second deed did not expressly revoke the first, because, in the understanding of the maker, the existence of issue, *per se*, put an end to it. Accordingly, on this understanding, he proceeds, in this second deed 1766, to dispone his whole heritable and moveable estate, leaving nothing that could be carried by the settlement of 1764, and from this fact itself, all former settlements, not expressly saved, must be presumed, revoked or superseded, the last implying a revocation of the first. The rule, therefore, that the deed 1764 must be held as contained in the deed of 1766 is ill founded in law; for this would be to do what the maker himself has not done, and what no Court has a power of doing, make a settlement for the deceased. And this was obviously contrary to his intention, because, after providing for the children of that marriage, he does not say, that failing them, his sisters, or nephews, or nieces, are to succeed; but, on the contrary, ends the destination by giving it to the children of his marriage with any future wife.

2. If what, in the law of Scotland, be technically called a title by service and infestation as heir of provision under the deed 1766, had been taken out to, or in the name of Captain Allan's son, which was undoubtedly competent, the succes-

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sion could not possibly have been taken by any of the persons named in, or appointed by the former settlements, but must be regulated by the investiture upon the deed 1766; and the respondent could never make up a title by service to the son under the deed 1764; and as the right, title, and interest in law did really belong to the son under the deed 1766, the succession of consequence ought to be regulated by that deed, it being plain that the taking or not taking out a title in legal form to the infant son, by his guardians recently after his father's death, cannot vary or affect his father's will or intention, as declared in his last settlement, which must therefore regulate the succession to his estate.

3. The appellants do humbly maintain, that the alterations which happened in Captain Allan's circumstances, posterior to the deed 1764, by his marriage and birth of a child, independent of the other alteration above-mentioned, by the sale of his lands in the islands of Walls and Hoy, which, by deed 1764, were conveyed to the appellant Jane, and her family, do afford clear presumptive evidence, that he did not continue of the same mind he was in at executing the deed 1764; and that such alterations in his circumstances, if no other will or disposition had been made, would be sufficient to operate an implied revocation of the disposition 1764, as well in regard to lands as to personal estate. But when, besides the said alterations in his personal circumstances, he actually executed the disposition 1766, adapted to his circumstances as then altered, it is humbly submitted that the disposition of 1764 was thereby revoked and totally set aside: and though the appellant made it appear that the doctrine maintained by her in this cause was agreeable to the Roman law, as well as to the law of England, and no way repugnant to the law of Scotland, yet the Court thought proper to adhere to the Lord Ordinary's interlocutor.

4. The personal estate, of whatever it consisted, was clearly vested in the son of Captain Allan, upon his father's death, even supposing the deed of 1764 not revoked, for that estate is only given over upon failure of issue of his own body: he had issue, and that issue of necessity takes an absolute interest in the personal estate, to which his next of kin are entitled. Besides, the personal estate in Scotland, having been reserved, and intromitted with by the appellant Jane, and her sister Margaret, under their legal title as executrices *qua* next of kin to him, decreed and confirmed by the commissary of Orkney, and the greatest part of such

personal estate, having been *bona fide* spent and consumed by them, before the challenge of their right by the respondent was brought into Court, or even before they had notice of such challenge, under such circumstances, the interlocutors, finding the respondent entitled not only to the real estate of Captain Allan, but also to the whole of his personal estate, and decreeing the appellant Jane, and her sister Margaret, to account for the same, without discount or allowance of what was *bona fide* received and spent by them, under a legal title before the commencement of the respondent's action, are plainly unjust, and, as the appellants humbly maintain, contrary to law and equity.

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*Pleaded for the Respondents.*—As the deed 1764 contains a destination and substitution of heirs, and as the deed 1766 contains no substitution of heirs or assignees to take on failure of his own issue, those destined to take by the deed 1764, on such failure, are entitled to succeed. The two deeds were therefore executed with different views, and the one is not a revocation of the other. The first only conveys to his sisters *on failure* of heirs of *his own body*. And the latter is a mere provision to his wife and children, leaving the succession to be regulated by the deed 1764, on their failure. They are therefore not inconsistent with each other, but stand and cohere together. The fact, that there is nothing in his latter settlement expressive of any alteration or revocation of the first, is proof of his intention and understanding, that the first was to take effect on failure of his issue; and he could have no other understanding than this, because, by that very deed which gave them a right to succeed, his sisters' right was only made to emerge on failure of the issue of his body; and also because he thereby expressly declares that the same is to remain valid and effectual, though undelivered at the time of his death, unless altered or revoked by a writing under his hand.

As to the interlocutors of the Lord Ordinary, after the judgment of the Court was given, the same were in terms of the judgment, and for the purpose of applying it to the several conclusions of the action, and no reason was, or can be assigned, by the appellants for setting them aside: the whole parties to the suit before the Inferior Court, other than the appellant and her husband, satisfied by the justice of the judgment, have acquiesced therein.

After hearing counsel,

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The SOLICITOR GENERAL, for the appellants, was proceeding in reply, to show that the proceedings had been wrong and irregular *ab initio*; that the counsel had been improperly instructed; that they had proceeded irregularly; and that the judgment of the Court of Session, having thus been led to decide upon a matter which, in all its stages, wanted that degree of formality necessary to legalize the proceedings; he contended that he saw no other remedy by which these difficulties could be removed, than by sending the case back again to the Court of Session, to have those mistakes rectified. Upon which

LORD MANSFIELD interrupted him; and said, that this was rather an extraordinary proposition, nor did he know well how to get rid of Mr. Solicitor's objection, but by either deciding the cause as it now presented itself, or the House agreeing to determine on its original jurisdiction.

SOLICITOR GENERAL insisted that the error in the proceeding was a bar to giving any decree.

LORD MANSFIELD asked, if he would choose to abide by the present judgment, or consent, in the name of his client, to pay £100 of costs on remitting the case; but the Solicitor dissenting to this proposal, his Lordship moved to affirm the interlocutors.

It was therefore

Ordered and adjudged that the said interlocutors be affirmed.

For Appellants, *Henry Dundas, Al. Wedderburn.*

For Respondents, *E. Thurlow, Ilay Campbell, Ar. Macdonald.*

*Note.—Unreported in the Court of Session.—The nature of the objection to the proceedings in the Court below does not anywhere expressly appear, but it seems to have been, either that this action of redress had been discussed on the merits, without first taking a term to satisfy the production—that term appearing not to have been assigned until after the case had gone to the Inner-House on the merits, and had come back to the Lord Ordinary; or the procedure of the Lord Ordinary, after that judgment was pronounced, had been irregular, in so far as new points on the merits were determined, and decree *contra non producta* was pronounced, without taking the usual remedy of going to the Inner-House before coming to the House of Lords.*

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[M. App. Vol. I. Insurance, p. 1. No. 1.]

**ELLIOT, &c.**

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ALEXANDER ELLIOT, and Others, *Appellants*; v.  
WILLIAM WILSON and Company of Glasgow, } *Respondents.*  
Merchants, - - - - }

**House of Lords, 25th Nov. 1776.**

**INSURANCE—DEVIATION.**—Brokers were instructed to insure a vessel and cargo, “ from Carron to Hull, *with liberty* to call as usual;” The broker effected the insurance, only with liberty *to call at Leith*. In former insurances between the same parties, liberty had always been given to call at Borrowstoneness, Leith, Morrison’s Haven, and Preston Pans, and the instructions to the broker were given with reference to that practice. The ship, in the course of her voyage, called at Morrison’s Haven ; and thereafter resumed her course, as contained in the policy, and sometime after was lost. Held, that as no permission was given to call at Morrison’s Haven, this deviation vacated the policy.

The respondents shipped 14 hogsheads of tobacco on board of the Kingston, one of the regular traders from Carron to Hull, and gave instructions to Hamilton and Boyle, insurance brokers in Glasgow, to insure "from Carron to Hull, *with liberty to call as usual.*"

These regular trading vessels from Carron were chiefly got up for service of the Carron Company, whose iron and coal were transported by their means to Hull and other places in the eastern coast of England. In going down the Firth of Forth, these vessels were usually allowed to call at Borrowstoneness and Leith, and at Morrison's Haven and Preston Pans, for the purpose of receiving or unloading cargo. And hence the allusion in the instructions to the insurance broker, "*with liberty to call as usual.*" An insurance was effected, the policy bearing, "*with liberty to call at Leith.*" The insurer was not privy to, or aware of this deviation from his express instructions, the insurance broker having retained the policy in his possession; but he relied that the terms of his instructions would be complied with in drawing out the policy.

The vessel had sailed five days before the date of the Feb. 4. policy, and the policy was dated and drawn out with liberty to call at Leith, 9th February. She did not call at Leith, but Feb. 9. put into Morrison's Haven, and proceeded thence on the 9th in

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her direct course for Hull, when, experiencing a storm near Holy Island, she was wrecked, and the cargo lost. The underwriters objected to pay the sum insured in the policy, on the ground of deviation, she having gone out of her course, and called at Morrison's Haven, a port not permitted in the policy; while the only liberty granted was to call at Leith. Action was in consequence raised by the respondents before the Admiralty Court, who found the underwriters liable under the policy, "in respect that in cases of insurance of goods on shipboard belonging to others than the owners and master of the ship, it is a general rule in law and practice, that the insurance is effectual although the loss may have happened in a deviation from the course of the voyage upon which insurance has been made, the insured not knowing or consenting to such deviation; and as the ship, after going into Morrison's Haven, and sailing from thence, did attain to, and was in the direct course of her voyage when she was wrecked." Thereupon the appellants brought a suspension of the Judge Admiral's

Jan. 8, 1776. decree. The Lords, of this date, and *founding on the whole circumstances of the case*, repelled the reasons of suspension, and found the letters orderly proceeded and decerned.

And, on reclaiming note, they again pronounced this inter-

March 7, — locutor:—"Find the suspenders (underwriters) severally liable to the chargers in payment of the respective principal sums and interest thereof, decerned for and underwrote by them, and also find them conjunctly and severally liable in the expense of the extract of the decreet before the Admiralty Court, as the same shall be certified by the clerk of the said Court; and in so far find the letters orderly proceeded, and adhere to the former interlocutor."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—In this case there has been a clear and wilful deviation from the course of the voyage insured; and in all such cases the policy is vacated and the insured cannot recover, it being immaterial at what point thereafter the loss occurred, because the deviation, when it takes place, voids though the vessel should afterwards resume her course, and, while sailing in the direct line, be then lost. Nor does it affect the question, in point of law, that the insured has had no concern with the ship, and was ignorant of any intention to deviate, because the respondents

knew well, by their instructions to their broker, that going into any port, except the port of destination, especially in an inland trading voyage, without permission, is a deviation from the due course of that voyage. The offer to insure in the general terms, proposed by the instructions to the insurance broker, are what few underwriters would accept; accordingly the broker was obliged to take a policy with a permission to call at Leith only. But whatever were the circumstances attending the insurance, and whatever were the respondent's instructions to his insurance broker, the underwriters can in no way be affected by either. The policy must fix the rights and obligations between the parties; and therefore a policy with liberty to call at Leith, excludes every claim to call at any other port.

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*Pleaded for the Respondents.*—Policies of insurance are to be construed largely, and for the insured—a rigid interpretation being inconsistent with the spirit of the law merchant. Were the appellant's construction applied, no voluntary deviation whatever would be allowable but what is expressed in the policy, whereas courts of law have been in the practice of allowing calls at places not expressly mentioned in the policy, if that is according to usage in such voyages. Here it was not only according to usage to call at Morrison's Haven, but the appellants knew of such usage in regard to this very vessel, because it had been two years before insured by the same company, for the same voyage, with liberty to call at Leith and Morrison's Haven at a less premium. But a policy on the voyage insured "with liberty to call at Leith," cannot surely be construed into an express prohibition to call any where else—the permission to call at one place not necessarily implying a prohibition to call at any other. The appellants, besides, were not at liberty to deviate from the express terms contained in the respondents' note of instructions sent for the insurance. They were bound to give and effect an insurance on the terms wished, or to refuse it. They did not reject it, but drew out a policy, without the respondents' knowledge, with liberty to call at Leith; but as this was never communicated to them, they cannot be affected by it, but were entitled to presume, the underwriters having accepted the proposal of insurance, that the policy would be drawn out as desired in their note of instructions, "with liberty to call as usual." Yet even were it otherwise, there was not such wilful deviation as could vacate the policy; for having liberty to call at Leith, in leaving that harbour she must necessarily pass Morrison's Ha-

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ven, six miles farther down the Firth, so that in point of fact she was never off the course chalked out by the policy. There was not any greater risk in touching at Morrison's Haven than at Leith. The course was the same, and even if it was a deviation at all, no damage was sustained by it; for the loss occurred after the vessel had resumed her due course. While it is clear that it could not be the understanding of parties that Morrison's Haven was entirely excluded from the liberty of call in the policy, because they all well knew that the vessel was then five days on her voyage, and actually at the date of the policy she was leaving Morrison's Haven for Hull, having passed Leith some days before that date. How then could the policy exclude every place but Leith, when at that point of time she had sailed past that port?

After hearing counsel,

The LORD CHANCELLOR said :—

“ That there was a wilful deviation, and although ships sailing on this voyage, have sometimes been allowed by the terms of a policy underwritten at the same premium, to go into Morrison's Haven, that could not avail him, since no permission was given here; that a wilful deviation from the course of the voyage insured is, in all cases, a determination of the policy, it being immaterial from what cause, or at what place, a subsequent loss happens; for, from the moment of deviation, the underwriters are discharged”

LORD MANSFIELD said :—

“ That there was a necessity for adhering strictly and invariably to the plain terms of the contract, expressed in the policy. That whatever might be the custom or practice, this contract was clearly made to guard against any latitude of construction, and to confine the insurance to one determined track. I have therefore to move that all the interlocutory judgments below be reversed; but that the insurers, having actually run no risk, the contract being null *ab origine*, they should return the premium, and pay costs, which their Lordships unanimously agreed to. His Lordship further observed, that the remedy of the insured in this case, lay against the broker, who had deviated from his instructions, and thereby rendered the policy null and void.”\*

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\* In addition to the above notes there is the following :—“ Lord Mansfield, it is said, considered it as a clear deviation,—and that the question came simply to this, was Leith Morrison's Haven? An allowance was given to call at Leith, but none to call at Morrison's Haven. He instanced a policy on a ship to sail from the Downs with convoy, but the convoy having sailed, she followed and came up with it at Portsmouth,—the underwriters were liberated. The terms of policies of insurance must be strictly adhered to, otherwise all insurances would be at an end.” Brown's Suppl. Tait, p. 486.

It was ordered and adjudged that the interlocutor complained of be *reversed*; And it is declared that the respondents are entitled to a return of the premium paid by them to the appellants, and it is therefore ordered and adjudged that the appellants do pay to the said respondents the said premium.

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For Appellants, *J. Dunning, Ar. Macdonald.*  
For Respondents, *E. Thurlow, Al. Wedderburn.*

LIEUT. ANDREW SUTHERLAND, - *Appellant;*  
ELIZABETH COUNTESS of Sutherland, and  
her Guardians, for herself, and on behalf } *Respondents.*  
of the other Creditors of Skelbo,

House of Lords, 26th March 1777.

**POSITIVE PRESCRIPTION—ABSOLUTE OR REDEEMABLE RIGHT—TESTING CLAUSE.**

A conveyance by charter was made of certain parts of an estate *ex facie absolute*, and bearing to be for a price then paid. Eight days before its date, a wadset had been granted of the same lands, in favour of the same party, which obliged the party to grant a letter of reversion. No letter of reversion was adduced, and no appearance of it on the records. The positive prescription and possession followed. Held, in the Court of Session, that the wadset right and charter qualified each other, and were to be read as one deed, and that the right was redeemable. Reversed in the House of Lords, and held that prescriptive possession on the absolute right, fortified the appellant's title; and that the right was irredeemable. The contract of wadset having been executed by the aid of notaries; Held, that as one notary and two witnesses alone signed it, the wadset was bad.

The estate of Skelbo originally belonged to the Earl of Sutherland, but afterwards came to belong to Lord Duffus, who held the same of and under the Earl of Sutherland and his heirs, as lawful superiors thereof.

Lord Duffus was attainted for high treason in 1715; and, in virtue of the Clan act, the estate of Skelbo was then claimed by and reverted to the Earl of Sutherland, in virtue of the clause in the act, which provided, that in case of forfeiture, the lands of any such subject "shall recognosce and "return into the hands of the superior; and the property "shall be, and is hereby consolidated with the superiority, "in the same manner as if the same lands, or tenements, "had been by the vassal resigned into the hands of the su- "perior *ad perpetuam remanentiam.*"

The Earl, and afterwards the Countess, made a claim to

1777. the estate under this act, but had, besides a distinct claim by virtue of an adjudication.

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M. App. I. *Sup. and Vas.* and also reduction improbation of the several adjudications or wadsets affecting the lands, and concluding that the same might be reduced as already extinguished and paid, or if not, to ascertain the extent thereof, and concluding that the several wadsetters might be warned and cited to appear and bring their several wadsets, &c., and upon payment to discharge and renounce, so that the estate might be purged of the same.

Among the wadsetters on whom notice and citation was served, the appellant, Andrew Sutherland, was one, whose wadset extended over the lands of Cambusavil, being a part of Skelbo and Duffus estates, for 1000 merks Scots.

But it turned out that the appellant laid claim to the lands of Cambusavil upon a higher right than a mere right in redemption. He claimed these lands as absolute and irredeemable proprietor, founded on a charter granted to him in 1611 by William Sutherland of Duffus, long prior to his descendant's forfeiture, and insisted that these lands should not be included in the ranking and sale.

The narrative of this charter set forth, a price paid as the value or consideration for the lands. "Et præsertim pro quadam magna pecunia summa, mihi per dictum Alexandrum Sutherland tempore confectionis præsentium grantanter et integre persoluta, de qua quidem pecunia summa teneo me bene contentum placitum et satisfactum, dictumque Alexandrum Sutherland suos hæredes, executores, et assignatos, pro me, meis hæredibus executoribus et assignatis de eadem exonero," &c. The tenendas bears that the lands were to be held of the granter, "in feodo hæreditate ac libere albæ firmæ in perpetuum," for payment of a penny yearly, "nomine albæ firmæ si petatur tantum pro omni alio onere exactione," &c. Then followed a clause of absolute warrandice and precept of sasine. Upon this precept of sasine infestment followed in favour of Alexander Sutherland and his wife, the grantees. And in virtue of this title, he had constant possession ever since 1611. This charter was afterwards renewed in 1642; and, in virtue of both, there was a complete title to the lands.

On the other hand, it was objected by the respondents, 1777. that this charter proceeded upon a contract of wadset executed eight days before the date of the charter, wherein SUTHERLAND the lands of Cambusavil were merely wadsetted to Alexander Sutherland for the sum of 1000 merks Scots, and that SUTHERLAND, the charter even bore reference to the contract. To this it was answered by the appellant, that although originally a Mar. 15, 1611. mere wadset was intended, yet that this did not preclude a new transaction, different in its nature, and that there was sufficient interval of time to allow of such new transaction. No doubt the contract bore William Sutherland to have received 1000 merks, and, in consideration of this, he bound himself to infest Alexander Sutherland and his spouse, "in "conjunct fee and liferent, and their heirs-male in fee, in "the lands of Cambusavil," they on their part binding themselves to deliver a sufficient "letter of reversion." But this letter was never granted. And there was nothing in this contract to preclude them making a new transaction, which was done accordingly by the feu-charter. The appellant further objected to the contract itself under the act 1579, c. 80, because, bearing two several dates of signing the same, it did not distinguish in the testing clause, which of the two contracting parties signed upon the 25th of February, and which upon the 15th March. It was further objected, that the notarial subscription for Isabella Ross was null, in so far as one notary and two witnesses only had subscribed, whereas two notaries and four witnesses were necessary, in terms of the act. And, finally, that his right was fortified by prescription. The Countess replied, as the charter 1611 was only a redeemable right, it would not be a good title to found prescription.

The Lord Ordinary, of this date, pronounced this interlocutor: "Finds and declares the lands of Cambusavil, and "others libelled, redeemable by the pursuers (respondents), "and they are duly and lawfully redeemed in terms of the "contract of wadset, from and after the term of Whitsunday "last, reserving to the parties to be further heard on the "other points of the cause, without prejudice to the decree "of declarator of redemption being extracted in the mean- "time." On further representation the Lord Ordinary ad- Feb. 16, 1774. hered; and on two petitions to the whole Court, the Lords Dec. 12, 1775. adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—Had there been a right of

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reversion granted, it would now be in existence; and produced to establish the redeemable right. The contract of wadset on which the Countess founds, only obliges the appellant's ancestor to grant a letter of reversion; and the question is, Was this letter of reversion ever granted, or was it not? The appellant contends that it was never granted; because a new transaction was entered into, by which an irredeemable right was conveyed of the lands of Cambusavil. In point of law, rights of reversion ought not to be reared up by mere implication, or by facts and circumstances, after the lapse of 150 years; nor ought deeds labouring under statutory nullities, as this contract does, be received in evidence of the existence of such reversion. They are *strictissimi juris*; and unless proved by the most unexceptionable written title, cannot be sustained. The *contract of wadset* is *not* the appellant's *title* to the lands. That *contract* is *prior in date* to the *irredeemable right* under which he possesses, and is, besides, null and void, in consequence of not being duly tested in terms of the act 1579, c. 80, as being only subscribed by one notary and two witnesses, in place of two notaries and four witnesses, and also because it does not particularize on which of the two dates the one or the other of the contracting parties signed it. Further, that this contract was clearly innovated by a subsequent agreement appears evident from the nonexistence and nonregistration of the bond of reversion, and no price being paid to Duffus "*tempore confectionis præsentium.*" In virtue of this charter and sasine conveying the lands irredeemably, the appellant has possessed the lands ever since 1611, and the positive prescription has run upon his right. Independently of this right, and supposing it defective, he has also a prescriptive title under the later charter of 1642, supported by prescription for more than forty years.

*Pleaded for the Respondents.*—By the contract of wadset it clearly appears that the intention of the parties was simply to make a wadset of the lands of Cambusavil, redeemable by Lord Duffus and his heirs, on payment of 1000 merks, and the respondent, in his right, has it now in her power to redeem them. The contract is explicit, and the argument of the appellant, raised upon the charter dated eight days after it, is untenable, that a new bargain was gone into. There is not the least vestige of evidence of this, and the "*magna pecuniae summa*" in that charter, cannot by any construction of words, be read so as to confer

an irredeemable right. The contract and charter bear reference to each other; and the object of the charter appearing in the absolute terms it does, was to give the wadsetter a right to be infest in the lands, to protect himself against third parties. The bond of reversion is doubtless not furth-  
coming, but this is easily accounted for from the misfortunes of the family, and the distance of time. The original right, therefore, being merely a redeemable right, no length of possession and prescription, can convert it into one absolute in its nature, because this title being defective, cannot prescribe a right of property. And it is no answer to this to say, that if the right was one limited in its nature, the reversion would, (although the original bond was lost), be registered in the register of reversions, in terms of the act 1617, without which it could not be effectual, because the answer to this is, that such rights may be used against the heir of the party, whether registered or not, though ineffectual against third parties; besides, the several legal interruptions in 1704, 1711, 1716, and 1735, bar the plea of prescription.

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After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be, and the same are hereby reversed.\*

For Appellant, *Dav, Rae, Ar. Macdonald.*

For Respondents, *Henry Dundas, Al. Wedderburn.*

Unreported in Court of Session.

[M. App. Tailzie, Part I. p. 1.]

ALEXANDER IRVINE of Drum,	-	Appellant.
GEORGE, EARL of ABERDEEN, MRS. MARGARET)	{	Respondents.
DUFF or CULTER, and Others,		

House of Lords, 16th April, 1777.

**DECREE OF SALE—ENTAIL—GENERAL AND SPECIAL CHARGE.—**  
Entail executed in shape of a procuratory of resignation, upon which charter was obtained, and this charter, but not the procuratory, produced judicially before the Court, and recorded in the Register of Tailzies. Held, that this was not perfect registration of the entail, and that the charter was not the original entail, but

\* Lord Mansfield reversed on the ground of the positive prescription pleaded by the appellant; as is noted on the papers of the London Solicitor, which the compiler has seen.

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the procuratory. Held, circumstances not sufficient to set aside a decree of sale impugned on fraud. Held that a general and special charge, as the warrants of an adjudication cannot be called on after 20 years.

This is the sequel of the case reported *ante* p. 249, which was a reduction of decree of sale, &c. of the estate of Drum, brought by the appellant, to whom it ought to have descended as heir of entail, but was now possessed by the respondents, as purchasers at the sale. In this reduction, the respondents produced the decree of sale, and insisted that this being a sufficient title to exclude, the action was barred. The House of Lords reversed the judgment of the Court of Session, finding the decree of sale a bar to the challenge, ordained the respondents to produce the writs called for, and remitted to the Court below to proceed with the cause.

The cause having come back to the Court of Session, it was debated, 1st, whether the respondents were bound to produce the writings respecting the estate of Auchtercoul, in regard to which little discussion had occurred in the previous part of the case, these lands being situated under different circumstances from that of Drum; 2d, Whether they were obliged to produce the general and special charges, and other warrants of the decrees in dispute? 3d, Whether the entail of Drum was completely recorded?

The Lord Ordinary held, that the previous discussions and judgment only related to Drum, and that the respondents were not barred from pleading the special defence, now maintained relative to the Baronies of Federate and Auchtercoul, and found as to these that they had produced sufficient rights and titles to exclude the pursuer's action of reduction; but found that they were bound to produce the general and special charges, and other warrants of the decrees brought under challenge, and all other writs and deeds specified.

Both parties having reclaimed to the Court, the Lords, of Feb. 28, — “this date, found, “In respect the general and special “charges called for, are not the grounds, but the warrants “of the decrees of adjudication, which the defenders are “not obliged to produce after 20 years; Finds, that the de-“fendants are not bound either to produce the said general “or special charges, or any other warrants of the decrees.” The appellant reclaimed, and, in the meantime, objection having been stated to the entail of Drum, as defective for want of registration, in consequence of the original entail of

Drum, executed by Alexander Irvine in 1683, (meaning the procurator of resignation), never having been judicially produced before the Lords, for the purpose of registration, but only a charter and relative nomination. It was answered, that as the entail of Drum was the first that was recorded under the act 1685, the Court had been careful in following its directions, as appeared from the record, which stated that the charter and relative nomination were produced, and that they were read and compared with the record in presence of the Lords, who interposed their authority thereto agreeably to the statute, and this having been done, the production of the procurator, which the respondents were pleased to call the principal entail, was not necessary—as the charter was the *entail* itself, just as certainly as it was a deed and disposition—that so the Court and the law viewed it at that time. The procurator of resignation was merely the act and will of the vassal, containing his instructions to the superior, that he might accept resignation for the purpose of granting a new charter or disposition, containing the strict limitations of an entail.

In considering both petitions, the Court, of this date, ad- July 24, 1771. adhered to their former interlocutors,\* and remitted to the Lord Ordinary, and his Lordship having resumed consideration of the cause, allowed a proof of the facts on the merits, but the respondents reclaimed to the Court, who, of this Mar. 5, 1772. date, pronounced this interlocutor, finding, "That the en- July 24, — tail executed by Alexander Irvine of Drum in 1683, not being duly recorded, is not valid against creditors and other singular successors; but, before answer as to the proof, ordain the pursuer to give in a condescendence of what he offers to prove." They also determined, "That the defenders (respondents) have produced sufficient to exclude as to the lands of Auchtercoul, and remit to the Lord Ordinary to proceed accordingly."† On reclaiming note the Court adhered. A proof was then taken and re- July 31, —

\* "Adhered to, in respect of the reasons mentioned in the former interlocutor, and that general and special charges are not part of the pursuer's title, but produced as evidence of the passive title against the defender; and also in respect of the former decisions of the Court, and acquiescence of the nation therein." Brown's Suppl. Tait, p. 465.

† "At advising the principal cause, Lord Covington argued, that there was a material distinction betwixt this case and the case of Kinnaird, for in this case the charter contained, and proceeded on a *novodamus*, so that it was truly the tailzie. But none of the other judges seemed to regard this distinction." Brown, Suppl. Tait, p. 622.

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ported, and the cause debated on the whole points of dispute.

The argument pleaded by the respondents in defence to the reduction, was founded on the length of time, and the credit due to the judicial sale, and other proceedings by which the estate had been legally sold, and acquired by them as purchasers. Also, the bankruptcy of the proprietor, even when the entail was executed, the entail itself not having been recorded.

The appellant, on the other hand, contended, that the estate of Drum had been unfairly alienated, to his prejudice as heir of entail—that the bankruptcy was fictitious—the sale collusive, and the whole proceedings illegal and fraudulent. He also repeated his argument as to the recording of the entail, insisting that the charter was the entail, and that it was recorded in terms of the statute.

June 26, 1776. The Lords, of this date, pronounced this interlocutor,—  
“Having advised the state of process, testimonies of the  
“witnesses, writs produced, memorials *hinc inde*, and whole  
“papers and proceedings in the cause, and having heard  
“parties’ procurators thereon, sustain the defences, assoilzie  
“the defenders, and decern.”.

An appeal was brought against the interlocutors of 24th and 31st July 1772, and 26th June 1776, in so far as they determine that the entail executed by Alexander Irvine of Drum was not duly recorded, and also in so far as they sustain the respondents’ defences.

*Pleaded for the Appellant.*—The estate of Drum was strictly entailed, and the entail duly recorded, according to the directions of the statute 1685 ; the charter of entail and relative nomination having been judicially produced, and properly entered in the register. The original entail spoken of in the act, must mean that which was understood at the time to be the entail, namely, the charter granted by the superior, and accepted of by the vassal, the consent of both being then necessary to give validity to an entail. So it was understood by the Court of Session, and every one, that the entail of Drum was just the charter of tailzie, and relative nomination of heirs. The estate was therefore good against alienations, and against creditors. But, notwithstanding this, a scheme was devised to break the entail by Irvine of Marthill, upon his succeeding as heir of entail, in conjunction with Sir Alexander Cuming of Coulter, who was his creditor, by raising up old extinguished debts of the en-

tailer, as if they were still due, in order to serve as a pretext for selling a part of the estate, which Sir Alexander meant to purchase. They found difficulties greater than they at first imagined, but ultimately made the £8000 Scots bond, which the entainer meant as a provision for his second son, Charles, the foundation of this proceeding. They adjudged for principal, interest, and penalty, and obtained decree, sustaining the bond as a charge against the estate, whereas they artfully concealed, that by a deed dated the very day after this bond, that deed was cancelled and a new one executed, making a provision to him of equal amount. If, therefore, the £8000 bond was not an existing debt, but, on the contrary, extinguished and cancelled, the adjudications upon it, and decree of judicial sale which followed those adjudications, by which the entailed estate was carried off, must be set aside. That, moreover, the agreement of 1773 with the appellant and his brother, had been violated, whereby it was agreed, that no more of the estate was to be sold but what was equal to the value of the debts then compounded for, which at that time did not amount to more than one-fourth of the value of the estate. The other debts of the entainer were all extinguished and paid, by partial sales, long prior to this scheme; such as the sales of Auchtercoull, Bruckly, and Ironside. And, therefore, although a judicial sale, and a decree of sale, was entitled to great weight, yet here, as the judicial sale was a piece of form resorted to, in order to give effect to a *private transaction*, that transaction being to transfer the estate *in fraudem* of the heirs of entail, no effect was due to it in this instance.

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*Pleaded for the Respondents.*—The appellant had no right to call for production of writings or deeds, respecting the lands of Auchtercoull, because the respondent, the Earl of Aberdeen, has produced rights thereto, sufficient to exclude; for by the entail of the estate of Drum, the heirs of entail were allowed to sell lands, for payment of the entainer's debts, which were so considerable as to make him bankrupt, and so to necessitate a sale. Besides, the entail of Drum was not recorded, and therefore could not protect against creditors, and the sale of it to Sir Alexander Cuming was good. There is no law for holding that the charter was the original entail, and that production of it to the Lords, in place of the deed or procuratory of resignation for registration, was sufficient compliance of the act. A charter upon an entail is altogether different from the original entail itself. Nor is there

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any reason to believe, and no evidence to shew that, even supposing the bond of £8000 Scots was laid aside, as not a true debt, any advantage could accrue to the family, when it is admitted that a bond for an equal sum was next day granted, which might have been the means of vesting a fee, or of withdrawing a considerable part of the estate. The sales, therefore, to Sir Alexander Cuming of Drum, and the Earl of Aberdeen of Auchtercoull, were unexceptionable. No fraud is averred in regard to the sale of the latter. The Earl paid a full price to the creditors, and his purchase is secured by prescription, and a decree of sale. There was no concealment, and no fraud proved in the conduct of the sale, but, even if there were, it is not the business of a purchaser at a judicial sale to examine into this. The Court see to the judicial procedure before it, and a purchaser is entitled to rely that every step is fair and unexceptionable. And, in regard to the writing called for, by law no one is bound to preserve the warrants of apprisings, adjudications, decrees, and other diligences, beyond twenty years, and therefore the appellant was not entitled to production of the general and special charge, these being the warrants of the adjudication.

After hearing counsel,

LORD MANSFIELD stated :—

“ During the last century, long and serious had been the investigation of the doctrine of entails, and the general opinion of all the judges was, that the practice was unfavourable to commerce, clogging and hampering to property, and in general hurtful to the public. However, in 1685, the legislature thought proper to give a kind of sanction to entails, under an express proviso that they should be registered in the courts of justice; that is, the original disposing deed; the procuratory of resignation to the Crown; the charter of *non-damus*; the precept of sasine and infestment, and so forth; particularly some of the special clauses of each, to be inserted in the court books, and, in case of failure of any of these insertions, the entail to be void. This was not a question of right or equity, it was mere strict positive law. The act directed specifically what was to be done. Was that done here? No. The entail itself is an unfavourable plea, therefore a defect could not be amended by any consideration of equivalent transactions or agreements. He recollects an anecdote he had from the late Lord Advocate, (afterwards Lord President Dundas), that he had kept an exact account of all the entails he, as a lawyer, had helped to make, and also of all that he had helped to break, and that he found, upon the whole, he had helped to break just as many as he had helped to make, (a most excellent caution to

landed gentlemen not to strive against the stream, by entailing their estates, which their heirs take as much pains to break, and thus waste their estates among lawyers), and he did not doubt but posterity would find out means of breaking these restraints. He then moved the interlocutors complained of be affirmed.

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**LORD CHANCELLOR** said :—

“ That the mere point of law was against the appellant ; but he wished to pronounce such a decree as would enable him hereafter to bring the matter before the Court of Session in Scotland, so as that he might not be debarred from prosecuting his right on the ground of informality only.”

**LORD MARCHMONT** seemed of the same opinion, and added, “ that the point of positive law was so involved with informal proceedings of the appellant, that it required some consideration to form a decree, in which the positive law, as well as the equitable right of parties might be preserved. Case adjourned, 17th April 1777.”

This case being resumed, the Lords agreed to affirm as below :—

It was ordered and adjudged that the interlocutor of the 21st and 31st July 1772 be affirmed. And it is further ordered and adjudged that the interlocutors of the 21st of January, 28th of February, and 26th of July 1771, and the interlocutor of the 26th of June 1776 be also affirmed, without prejudice to any satisfaction in money that the appellant may be entitled to in respect of any claim he may have in virtue of the agreement 1733.

For Appellants, *Al. Wedderburn, Alex. Murray, Dav. Rae, Alex. Wight, Ilay Campbell, S. Douglas.*

For Respondents, *E. Thurlow, Henry Dundas, Al. Forrester.*

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LADY CRANSTOUN and MICHAEL LADE, Esq., *Appellants;*  
GEORGE LEWIS SCOTT and Others, *- Respondents.*

House of Lords, 21st April 1777.

**RENUNCIATION—DONATION INTER VIRUM ET UXOREM—REVOCATION.**

—A husband procured a renunciation from his wife of her provision secured preferably over his estates, in order to allow these to be sold, and price paid to his creditors. Held, the wife not bound by the renunciation, although third parties were interested, and had agreed to abate claims on her granting it.

The late Lord Cranstoun, in contemplation of his marriage with the appellant, daughter of Jeremiah Brown of Apscourt, entered into two several marriage settlements

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the one in the Scotch form, to affect his Scotch estates, and the other in the English form, to affect his English estate; both deeds having reference to each other. By the settlement applicable to his Scotch estates of Crailing and Wauchope, he secured to his intended spouse an annuity out of these of £700 per ann., payable on his death. In virtue of this settlement, the wife was infest in the estates in Scotland, and the sasine duly recorded.

The English deed bore, "for the better and more effectually securing the payment of the said annual sum or yearly rent of £700 so secured in the said settlement or articles of marriage, of equal date herewith, executed according to the law of Scotland, as aforesaid; and for that purpose, that in case the said annual rent or yearly sum of £700, or any part thereof, shall be behind, or unpaid, for six calendar months next, the time when payment falls due, then and in that case, recourse shall be had for payment out of the rents of the English estate." The Scotch estate was thus primarily liable, and the primary security for the annuity.

Lord Cranstoun, at the time of his marriage, owed considerable debts, and these having thereafter increased, his creditors took measures to enforce a judicial sale of the Scotch estates of Crailing and Wauchope. In the course of the proceedings a claim was entered for Lady Cranstoun's annuity of £700 secured by her marriage settlement, which was preferable to the respondent George Lewis Scott, Esq., and many other creditors. It was therefore made a condition of the sale, that £14,000 of the price should be set aside to answer her annuity. But a proposal was thereafter made by the creditors, that she should renounce and discharge her security for her annuity of £700 per ann. on the Scotch estates, and betake herself to Lord Cranstoun's English estates, upon which these creditors supposed she was primarily secured, in consideration of which, they, on their part, agreeing not to exact penalties or accumulation of interests on their bonds. This proposal proceeded on mistake, because she was only entitled to resort to the English estate on failure of payment out of the Scotch estates. This arrangement was not gone into at the time.

In the meantime, Lord Cranstoun's embarrassments had increased; and his necessities being pressing, he had procured through the influence he had over his wife, many deeds for the purpose of raising money. One of these deeds was, a renunciation of her annuity secured by her marriage settlements

on the Scotch estates, the object of which being, that Lord Cranstoun might carry off a large portion of the price of these estates when sold. This deed proceeded upon the former proposal of the creditors, made five years before, and narrated and proceeded upon the footing of "my renouncing " my annuity out of the estate of Crailing, and taking myself therefor to the *English* estate, whereby the creditors " would get immediate payment of their debts, and they " would give down all accumulations; therefore I renounce " and discharge the foresaid annuity in so far as the same " affects the Scotch estates." This deed, unknown to her Ladyship, was recorded, but nothing followed upon it, the creditors doing nothing on their part to implement it, and she on her part concluded that it was departed from. She afterwards sought for the renunciation, with the view of cancelling it, but found it could not be got, as it had been put on record. The estates, when sold, were sufficient to answer all purposes; and £14,000 was set apart from the price to answer her annuity. Lord Cranstoun died in 1773, and his widow was afterwards married to Mr. Lade.

All questions among the creditors *inter se* being settled, and the purchaser anxious to pay the price, the present multiplepoinding was brought, to which Lady Cranstoun and her husband Mr. Lade were made parties. She claimed in the multiplepoinding to be preferred to the £14,000. The respondents, creditors of his Lordship, objected, on the ground that, by the renunciation executed, she had discharged all claim for her annuity on the Scotch estates.

The Lord Ordinary, after various interlocutors, of this date, found: "In respect of the special circumstances of Nov. 14, 1775. " the case, finds my Lady Cranstoun is bound by her transaction, and that she cannot revoke it." At sametime, it was found she was bound to assign her security over the English estates. On reclaiming petition the appellants contended that the renunciation was *donatio inter virum et uxorem*, which was revokable at pleasure, at any time during the granter's life. Judicial ratifications were not necessary to deeds of pure donation between husband and wife; which this undoubtedly was. And even supposing it a deed not to the husband, but to the creditors, or third parties, then it was still null, as wanting her judicial ratification, which was necessary to belie the presumption *ex vi aut metu*. Upon these principles of the law of Scotland, it was that the Lord Ordinary had, by two consecutive interlocutors, adjudged this renunciation to be void as a *donatio inter virum et uxo-*

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rem. The Court found "that the deed of renunciation by "Lady Cranstoun is binding upon her, and her husband, for "his interest, and that she is bound to implement it, and "remit to the Lord Ordinary to proceed accordingly." On further petition the Court adhered, (10th August 1776.)

Against these interlocutors the present appeal was brought to the House of Lords.

At this stage of the proceedings in the House of Lords, the appellant, Mr. Lade, having discovered, from the proceedings in 1772, regarding the division of the price, that this question regarding the renunciation had been decided in Lord Cranstoun's lifetime, obtained leave to bring these before the House, from which it appeared that on 29th July 1772, the Lord Ordinary had found there was "no evidence that the transaction they intended was concluded, "and therefore finds the creditors are not bound to give "that abatement of their debts." On representation and answers, this interlocutor was adhered to. It also appeared from the minutes of the creditors, that Lord Cranstoun had proposed a new scheme, and the creditors were disposed to agree to this, provided a new deed of renunciation was granted by the appellant, Lady Cranstoun, duly ratified by her before a magistrate; but no such deed was ever executed by her.

*Pleaded for the Appellant.*—The renunciation, as being a *donatio inter virum et uxorem stante matrimonio*, was void by the law of Scotland, and was revokable at pleasure, at any time during the grantor's life. Lady Cranstoun did every thing in her power to obtain possession of this deed, in order to cancel it, and, consequently, must be held to have virtually revoked it. The renunciation was further void, as proceeding on false grounds, supposing that the appellant's annuity was secured on both English and Scotch estates alike, whereas the English estate was only to be a security if the Scotch estates failed to afford payment. Consequently the result of this renunciation would be, if sustained, to deprive her of her annuity entirely, because, as the Scotch estates have not failed, she has no recourse against the English. The renunciation, besides, was never accepted by the respondents, nor did they, at any time during Lord Cranstoun's life, bind themselves to perform the obligations they came under. The transaction was never completed, and could not be so, until they executed another deed, binding themselves as the counter part. The whole deed, in its meaning and intent, points at things to be

done in the future, and is not in itself definitive or conclusive. She had, therefore, power to resile. Further, the appellants are not bound, under a sound construction of the two marriage settlements, to assign to the creditors any security she may have over the estate in England, because the avowed object of that security was only to come in aid of the Scotch estates when they failed, or were deficient.

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*Pleaded for the Respondents.*—The deed of renunciation and discharge is not a *donatio inter virum et uxorem*; but an agreement entered into for a valuable consideration, not between husband and wife, but between third parties,—namely, Lord Cranstoun's creditors, and therefore a deed in its nature not revokable at pleasure. Even supposing it were entirely gratuitous, and had no consideration, such a deed would not have been revokable. In regard to the interests of husband and wife, and in so far as it was a gift from the one to the other, it might be revoked, but not so as to affect the interests of third parties secured by it. The deed here in question was perfectly complete in itself. It was a mutual contract, in which Lady Cranstoun instantly renounced her jointure, and the creditors immediately restricted their debts. No counter obligation, no future deed, no act of acceptance, were necessary, as the deed was complete, definitive, and conclusive of itself; and the fact of causing it to be registered, was evidence of its being considered a completed deed. Even supposing it were to be held as one side of a mutual contract which required a counterpart, it is still competent to the creditors to make one. This is the established law of contracts. The creditors have not failed to perform their part; on the contrary, they are willing to perform; and the appellants are not, in the meantime, entitled to resile, as from an incompletely contracted.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed; and it is declared that the deed of renunciation executed by Lady Cranstoun is not binding upon her; and that she is not bound to implement the same; and it is further ordered that the Court of Session in Scotland do give all proper directions for carrying this judgment into execution.

For the Appellants, *E. Thurlow, Al. Wedderburn, Dav. Rae, J. Dunning.*

For the Respondents, *Henry Dundas, Ar. Macdonald.*

Not reported in Court of Session.

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ROBERT BRUCE E. M'LEOD of Cadboll and  
Guardians, - - - - } Appellants;

M'LEOD, &c. MUNRO Ross of Pitcalny, and Miss JEAN Ross, Respondents;

<sup>r.</sup>  
ROSS &c. CAPT. JOHN LOCKHART Ross of Balnagowan, Appellant;  
MUNRO Ross of Pitcalny, and Miss J. Ross, Respondents.

House of Lords, 5th May 1777.

FEU-DUTY—SUPERIOR AND VASSAL.—A charter bound the vassal to deliver thirty bolls of corn yearly, or, in his option, 6s. 8d. Scots for each boll, as conversion money. The subsequent investitures omitted the option of the conversion money. Held the superior not entitled to claim the *ipsa corpora* of the victual, but the conversion money only.

Easter and Wester Drums of Fearn, belonged anciently to the family of Ross of Balnagowan, and were held by them under the Commendator of the Abbey of Fearn, as superior thereof, and afterwards under the Crown, as coming in place of the church, for payment of 30 bolls of corn yearly.

1592. George Ross of Balnagowan sold Wester Drum of Fearn in 1592, to Walter Ross of Morenzie, upon which occasion he resigned the said lands into the hands of the superior, the Commendator, and, of same date, obtained a charter of resignation, containing the following reddendo, expressing the feu-duty payable by the vassal: “Triginta bollas victualium firmæ (corn rent) vel pro qualibet bolla insoluta summam sex solidorum octo denariorum usuali monete regni extenden. ad summam decem librarum usualis monete prefate et id in optione solventium, ad duos anni terminos,” &c. Upon this charter Walter Ross was infest; and, on 14th March thereafter, obtained a charter from the Crown, ratifying and confirming the charter granted by the Commendator, and expressing the feu-duty as thirty bolls of corn, or 6s. 8d. Scots for each boll, in the option of the vassal.

Thereafter the Crown gave a grant of the Abbey of Fearn to Sir Patrick Murray, who, wishing to reduce the above conveyance, instituted proceedings for that purpose. These ended in a charter passed under the Great Seal, dated in 1600, and proceeding on the resignation of Ross of Morenzie, and also of Sir Patrick Murray, with consent of Ross of Balnagowan, wherein the feu-duty, mentioned as payable to the superior, was thirty bolls of corn, payable “secundum formam et tenorem antiqui infeofamenti eorundem.” This

charter was in favour of Munro Ross, the purchaser from Ross of Morenzie; and under it the vassals had paid for many years the 30 bolls of corn yearly.

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In the meantime, the property of Wester Drums of Fearn had gone successively into different hands by purchase, and finally into the hands of James M'Cullock, for the payment of whose creditors it was made the subject of a ranking and sale; and after being sold, and the creditors paid, there remained a surplus to be divided among the respondents, as heirs of the family. This reversion was made to depend on the validity of a claim, lodged in the ranking by the appellant, M'Leod of Cadboll, who claimed, as in right of the feu-duties from 1697 to 1717, the *ipsa corpora* of the thirty bolls of corn yearly. The respondents disputed his right to claim the *ipsa corpora* of the corn rent, and maintained that the vassal was entitled to avail himself of the option of the conversion thereof, at 6s. 8d. Scots per boll.

The result would have been, that if this claim was sustained, M'Leod was entitled to £800, being nineteen years feu-duty, at thirty bolls of corn yearly; but, if only entitled to the conversion money of 6s. 8d. Scots money, his claim only amounted to £12. 10s.

M'Leod's title to the feu-duties was founded upon conveyances of adjudications for debt as follows:—George Ross of Balnagowan had purchased from Sir Patrick Murray his right to the Lordship of Wester Fearn of Drum, granted to him by the Crown, and by which he claimed right to the feu-duties of these lands. The right to these feu-duties was wadsetted by David Ross of Balnagowan in 1673, to Sir John Urquhart, and this wadset, by adjudication led against Sir John Urquhart, came afterwards to belong to M'Leod, who raised an action of mails and duties against M'Cullock, the proprietor of Wester Drum, and obtained decree for payment of 30 bolls of corn yearly, for crops 1697, 1698, and 1699, at £12 Scots per boll, and for payment of the like duties in all time coming.

1673.

The matter here rested, until the question was again raised by General Ross of Balnagowan, in the present action, and continued by his son, Captain Lockhart Ross, the appellant, who brought a reduction and declarator, to have it found that M'Cullock, Miss Ross, and others, possessors of these lands of Wester Drum, should be ordained to hold these lands of him as superior lord thereof, and ordained to pay to him the *ipsa corpora* of the thirty bolls of corn, as the feu-duty payable therefor. The respondents stated their defence, founded on

1777. the option given to the vassals, to pay the conversion money of 6s. 8d. Scots per boll.

M'LEOD, &c. *v.* Captain Ross's claim to the *ipsa corpora* of these bolls was rejected, of this date, and as to M'Leod's claim, the *Lord Ordinary*, of this date, "Found that M'Leod of Cad-and March 1769. boll is not entitled to claim the *ipsa corpora* of the thirty Dec. 5, 1775. 'bolls of victual, as the reddendo or feu-duty for the lands in question, but, that Miss Jean Ross is entitled to pay the conversion money." And, on reclaiming notes, the Court, Nov. 19, 1771. by two separate unanimous judgments, adhered, and July 11, 1776. sustained the option of the vassal to pay the conversion money of 6s. 8d. Scots per boll.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—It was not in the power of the Commendator of the Abbey of Fearn to discharge the actual delivery of the thirty bolls of corn, in his grant to Walter Ross in 1592, because, by the act 1585, such grants were declared null, as a stripping of the Abbey of its lawful revenue, by introducing a conversion money at a low rate. And, accordingly, this grant, with its conversion, was soon thereafter questioned by Sir Patrick Murray, the Crown's grantee, and the option given to the vassal abolished by the new charter and investiture to Munro in 1600, the reddendo of which only mentions thirty bolls of victual, without any conversion, thus differing from the charter in 1592. This last charter was the title of Munro's possession of Wester Drums, and has remained the radical title in his successors ever since. Upon this title possession has followed, in as much, as the vassals had, subsequent to its date, paid to Balnagowan's wadsetters from 1660 to 1689 the *ipsa corpora* of the thirty bolls of corn yearly. Indeed, the disproportion between this and the conversion money of 6s. 8d. Scots by the former title, is so apparent as to convince the vassals of the right to exact such, and to make them at once deliver the thirty bolls corn. Besides, this possession is fortified by the decree obtained in the action of mails and duties in 1707 for these very feu-duties, and the respondent's plea is now barred by that decree. And, even supposing this decree was not a sufficient *res judicata*, still the proceedings in the action must be of importance in point of evidence. But the respondent imagines he gets over all these objections, as well as the charter 1600, by stating, that the clause "secundum tenorem, antiqui infeofamenti" referred to the feu-duty as payable by the former charter of 1592, but the word antiquum cannot surely apply to a charter granted only eight

*years before*; and, accordingly, this clause must be construed to apply to a period anterior to that date, and when nothing but thirty bolls of corn were deliverable as the feu-duty.

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*Pleaded by the Respondent.*—From the evidence afforded by the whole progress of titles, it clearly appears that the feu-duty payable by the vassal of Wester Drums of Fearn was thirty bolls of corn, or 6s. 8d. Scots, as the conversion money in room of each boll, in the option of the vassal. The vassal, therefore, had this option conferred upon him by the oldest title produced in this process, namely, the contract of sale of Wester Drums by Balnagowan to Walter Ross, and charter following thereon in 1592. The sale by Walter Ross to Munro, and new charter or novodamus following thereon in 1600, does not derogate from the former charter in the least, because, although in this later charter, the option of conversion is not expressed, yet it was clearly implied under the words “secundem tenorem antiqui infeofamenti eorundem,” and, accordingly, there is no pretence for supposing that there was a departure from the original redendo, and as little reason for the allegations, that the option in that charter (1592) was a dilapidation of the benefice prohibited by the charter 1585. The possession alleged after the charter 1600, in so far as the vassals delivered the *ipsa corpora* of the thirty bolls of corn, cannot deprive the proprietor of Wester Drum of his right. The receipts referred to can only prove that the vassal, at that time, chose the option of delivering thirty bolls, in place of paying the conversion money; but this still left the option open to be exercised otherwise, by him or any other subsequent vassal. It could not be lost *non utendo*, or a contrary possession as *res mercæ facultatis nunquam prescribuntur*. And the decree of mails and duties in 1707 could not affect the right, because it passed in absence of the defender, then an infant, and so could form no *res judicata* or bar to the option now insisted in.

After hearing counsel, it was  
Ordered and adjudged that the said interlocutors be af-  
firmed.

For Appellants, *Henry Dundas, Alex. Wight.*  
For Respondents, *E. Thurlow, Dav. Rae.*

*Note.*—This case imperfectly noticed in Brown's Supp., “Tait,” vol. v. p. 615.

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[M. App. "Clause," P. 1. No. 1.]

CUNYNGHAM,  
&c.  
v.  
CUNYNGHAM.

ROBERT MYRTON CUNYNGHAM and FRANCIS  
CUNYNGHAM, second and third Sons of }  
Sir Wm. AUGUSTUS CUNYNGHAM, Bart. } Appellants;  
and their Guardians, - - -

DAVID CUNYNGHAM, Esq. Eldest Son of the }  
said SIR WILLIAM, - - - Respondent.

House of Lords, May 1777.

**POSTNUPTIAL CONTRACT—RESERVED FACULTY.**—Shortly after his marriage, a party executed a postnuptial contract, settling his estate on the heirs male of the marriage, whom failing, on the heirs female of that marriage, reserving power, in case of there being no heirs male, "and two, three, or more daughters," to settle the estate on either of the daughters. He had no sons, but there were three daughters of the marriage, the two eldest of whom predeceased their father. He afterwards executed a new deed, settling the estate on the second and third sons of the youngest daughter. Held, in the Court of Session, that this deed did not fall within the special powers reserved, and was reducible, as the father's faculty and powers were at an end.\*

This judgment was affirmed by Lord Mansfield in the House of Lords.

For full report of case, *vide* Morison, App. "Clause," P. 1. No. 1.

For Appellants, *E. Thurlow, Dav. Rae, Gilb. Elliot.*

For Respondent, *Al. Wedderburn, Alex. Murray, Ar. Macdonald.*

\* **NOTE.—Opinions of Judges as noted on Lord President Campbell's Session Papers, vol. xxx.**

**PRESIDENT.—GENERAL POINT.** "Father was in former times considered as unlimited fiair—Dirleton—Afterwards considered to have *jus crediti*, but of the gentlest kind. Remains fiair entitled to do rational deeds for consideration not fraudulent. Onerous deeds good, not merely on faith of records but father's powers. Inhibition would be good for nothing, it could not extend to it, because fee in father. Here consider what is in view. If daughter, do not choose to give up powers. If a son, he is to take absolutely, but not if daughters. If he can give it to the children of any daughter, why not to a younger child of that daughter? She may be married to a peer or family that he does not like. This construction necessary to carry intent out into execution. All the concern of the friends is, that it shall go to *familiae* not to the heir-at-law. Otherwise eldest daughter succeeds. Must not give it to a stranger.—Samething to us which of them. Admit that he could not exclude the daughters. Must come

through her. In case of Phisgil disinherits heir of marriage. 1777.  
Question of tailzie is of a different nature as put by Lord Coving-  
ton. Both pursuer and defender are heirs-portioners, i. e. claim un- CUNYNGHAM,  
der an heir-portioner. Contract 1764, no implement—sustains rea- &c.  
sons of reduction." v.  
CUNYNGHAM.

**GARDENSTON.**—“ Not important in point of precedent. Depends on clauses, so turns entirely upon construction of reserved powers,—if in the usual manner, no doubt the father bound,—question is, whether to interpret the clause literally and judicially, or liberally according to sense of parties. Clear that the clause is entitled to a large construction—entitled to choose his heir among his family. Would not do justice if he did not go further than mere words. This both the rational and legal construction. Impossible to presume that he meant to reserve less power as to daughter than as to their children. Inconceivable that he meant to give an indefeasible right to children and not to daughters; besides, legal construction against this, for in law it is implied that the child coming in place of daughters, can have no better right than the daughter herself. Right defeasible in daughter, and must be the same in child. Suppose he had burdened his daughter with a reserved faculty of providing £10,000 to younger children, and that she had predeceased, leaving a son, could he not have burdened the child ?”

**COVINGTON.**—“ Impossible for the art of man to devise an entail which may not be found fault with or cavilled at. Case of Leslie presented same difficulties as to conception of deed,—impossible events. It is very problematical whether father's powers should be limited or enlarged. In England, father generally has no power at all. Father continues proprietor, has a power to carry on the line of succession ; but still so as not to prejudice the children of the marriage. Must transmit to heir of marriage ; and heir must have power of settling the estate as he pleases. My opinion upon the question of entailing is, that father has no such power. Cannot defeat the heir's right in whole or in part. This perhaps the most moderate entail, yet it contains one condition, viz. to carry name and arms, &c., under irritancy ; in certain cases may forfeit. This of itself sufficient to cut it down. *First Point*—Not for a judaical construction of the clause, but just ground of distinction between heirs-male and heirs-female ; but this is not an absurd or irrational clause. Reasonable to single out any of the daughters he thought proper. I am inclined to think that he had same power over issue of the daughters, if two of them had issue, because they came to be in the same case as their parents. But it is question if he could prefer any of descendants, for in that view he might have preferred a grandchild to the daughters themselves. Cannot carry it so far.—Titles of honour in England. Case of ———. Crown could not have given it to the child of heir-portioner. The same way here, he cannot take the younger child of a daughter. Suppose sons had daughters, and he had pre-

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*Second Point.* "Contract 1764, not with Jean Myrton herself, but with her husband (Mr. Fletcher). The object of it was to prefer her and her issue; but unalterable settlement. Sir Robert agreed to discharge his powers of preferring younger daughters. Renounces the powers in the contract of marriage altogether—therefore contract must operate. Sir Robert not the arbiter to settle at his own pleasure—strict construction must be laid down if he means to carry the succession from heirs of the marriage altogether. I think the second contract should not operate beyond the interest of the parties contracting."

**JUSTICE CLERK.**—"For adhering—Faculty at an end. *Est divinit in eum casuam.*"

**GARDENSTON.**—"I am for altering powers of father,—ought to have most liberal interpretation."

**KAMES.**—"Postnuptial contract this, which is different from antenuptial. Do not go together upon that faith. Husband has every thing already. Word contract has no charm. Suppose a son of another marriage. (Covington previous commencing—makes over whole estate), Meaning was not to pick out of any of his descendants. As to sons, clear that no such power; if meant as to daughters and their issue, it was easy to have said so. By giving it to his eldest daughter, he exhausted his power, and not *termini habiles* for doing it again. Suppose Lady Cunningham had daughters, could he have given estate to her daughters in preference to her son?"

**BRAXFIELD.**—"Postnuptial contract makes no difference in the question. It would be dangerous to find that postnuptial contract not onerous."

"Child a creditor for provisions in contract.

"Father cannot lawfully hurt child, either onerously or gratuitously; would annul warrandice of contract by so doing. Sum of money may, but case of land estate settled upon heirs of the marriage,—therefore only question here is, what is effect of reserved faculty? Where a man is giving his estate for nothing, the reserved faculty is entitled to an extensive construction, but in case of onerous contracts the contrary takes place. Suppose no other daughter than Lady Cunningham had existed, no *termini habiles* for faculty. Case same here, where she became the only one. If a daughter dies leaving a son, would consider him in the place of his mother, an heir-portioner, and in his daughter's power to give it him by very construction of contract. But where there is only one heir-portioner, faculty is at an end, though it was cut off by transaction with Mr. Fletcher before; how then can it revive? Suppose it had been

faculty of burdening, with £5000, could be take it up again even if it came to a remote substitute? Besides, this discharge shews Sir Robert's own sense of the matter. Sees that there is no room for exercising it afterwards."

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 SPEIRS, &c.  
v.  
DUNLOP, &c.

PRESIDENT.—“Late practice has made marriage contracts so binding—Dirleton—This contract not in the common style—meaning of reservation—father was to give him ample powers, bound only *familæ* tied down to heirs-male for preservation of family; but if it comes to heirs-portioners, power is reserved to give it to any. Admitted that would give it to descendants. This only another exclusion. Suppose two daughters of Lady C. and no sons *Second Point*, discharge. Lady C. no creditor in it, only substitute.”

MONBODDO.—“Powers not discharged. Only done so as to Mrs. Fletcher and heirs of her body—Case of Baillie, &c. *Second Point*, Two or more—how can I add another clause? Words clear—No evidence what his intention was. Defender not the heir, either by the law or by contract. If it was his intention, he has not executed it.”—“Adhere.”

[M. App. P. 1. No. 2. “Society.”]

ALEXANDER SPEIRS, ANDREW BLACKBURN, and }  
ANDREW SYME, JAMES DUNLOP's Trustees, } *Appellants*;  
THOMAS and Wm. DUNLOP and Co., Trustees }  
for the Creditors of JOHN CARLYLE and Co. } *Respondents*

House of Lords, 9th May 1777.

RANKING—SOCIETY—COMPANY AND INDIVIDUAL ESTATE—PRINCIPLES

OF RANKING.—(1) Held that a company are entitled to rank on an individual partner's separate estate, *pari passu* with the creditors of that separate estate, for the whole amount of debts owing by the company after deducting any dividends that may have been paid to the company creditors. But, (2) Held in the House of Lords, that where, after a dividend on an estate was declared, and most of the creditors paid, a new claim was lodged for the first time on the estate, that such claim will not be allowed to disturb or affect the dividend paid before any notice was received of such claim.

James Dunlop, merchant in Glasgow, carried on an extensive Virginia trade on his own separate account. He was also partner of another concern, carried on under the firm of John Carlyle and Co., merchants in Glasgow. A misfortune in the Virginia trade obliged Dunlop to stop payment; and sometime after the company of Carlyle and Co., in which he was a partner, also failed.

At the time Dunlop failed, the only claim which Carlyle and Co. appeared to have against Dunlop as an individual, was a sum of £4500, for goods furnished him in his separate

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trade. In three years afterwards the company of Carlyle and Co. made a dividend to the creditors of 6s. in the pound, and it was not until 10 years after the failure, and after a dividend of 10s. in the pound had been declared, and paid to the greater number of the creditors of the estate of James Dunlop, that a new claim was lodged by the company of Carlyle and Co. against the estate for £12,000 due by him, per account, and also of £17,000, being the amount of debts due by Carlyle and Co. to their creditors. Waving all objections as to particular items, the main objection insisted on against the ranking of these two claims on James Dunlop's individual estate was as to the principle of ranking. The trustees of John Carlyle and Co. claimed on the first sum £12,000, as a common debt due to the company. They claimed also the £17,000 on the principle, that as James Dunlop was one of the partners of Carlyle and Co., he and his estate was personally liable for the whole debts of that company, and that the creditors of the latter were entitled to be ranked *pari passu* along with Dunlop's creditors on his separate estate. To this latter claim of £17,000, it was objected that the creditors of Carlyle and Co. were not entitled to rank and claim a dividend on James Dunlop's separate estate, until his own separate creditors were fully paid. That to rank and draw a dividend on both sums of £12,000 and the £17,000 was double ranking, inasmuch as if the £12,000 were paid there was so much struck off the debt of £17,000 due by that company, and *vice versa* if the £17,000 were paid, the whole claim would be extinguished. Besides, the creditors of Carlyle and Co. had already been paid 6s. in the pound, so that there was no more due to the creditors than £9,200. To this it was answered, that these creditors were entitled to rank on both claims, to the effect of recovering the full amount of these debts on Dunlop's separate estate *pari passu* with his separate creditors.

The Court, on report of the Lord Ordinary, pronounced July 4, 1776. this interlocutor, finding that the trustees of John Carlyle and Company "are entitled to be ranked on the estate and " effects of James Dunlop junior, for the amount of the debt " due to the said co-partnership of John Carlyle and Co. by " the said James Dunlop: and after imputing the dividend " arising from the said debt due by the said James Dunlop, " and the dividend already paid from the company's effects " in extinction of the debts due by the said John Carlyle " and Co. to their creditors, along with the other funds

"arising from the estate of John Carlyle and Co. remaining  
 "in the hands of the pursuers, yet undivided, that the said  
 "pursuers, as trustees for the creditors of the said John <sup>SPEIRS, &c.</sup>  
 "Carlyle and Co., are entitled to be again ranked on the <sup>v.</sup> <sub>DUNLOP, &c.</sub>  
 "estate and effects of the said James Dunlop for the ba-  
 "lance which shall then be remaining due to the said credi-  
 "tors of the said John Carlyle and Co.; the trustees of the  
 "said James Dunlop being entitled to an assignation from  
 "the said John Carlyle and Co.'s creditors, so far as they  
 "shall draw upon the second ranking, for the purpose of  
 "operating relief to the estate of James Dunlop from the  
 "other partners of the said John Carlyle and Co., in so far  
 "as the said creditors shall draw more than his proportional  
 "share as an individual of that company, and remit to the  
 "Lord Ordinary to proceed accordingly." On reclaiming Aug. 9, 1776.  
 petitions the Court adhered.\* Dec. 8, —

Against this interlocutor both parties appealed to the House of Lords; the respondents, because they were only admitted to rank the second time on the balance that might remain due to the creditors of Carlyle and Co. after imputing the sum set forth in the interlocutor.

\* *Notes from Lord President Campbell's Session Papers.*

COVINGTON.—"If J. Dunlop, junior, pays £19,000, i. e. whole debts due by the company, then if he comes to be a creditor, so far as he pays beyond his own proportion he may compensate. But I doubt if he becomes a creditor to the company, he becomes creditor to the individual whose proportion he has paid."

PRESIDENT.—"Suppose both assignments."

COVINGTON.—"Cannot take assignments."

KAMES.—"Do not see why he may not."

MONBODDO.—"If company fails, will he have recourse against his partners?"

PRESIDENT.—"I incline for the middle way, which was the equitable plan."

COVINGTON.—"Suppose some of the partners become bankrupt, and a solvent man pays: he can only demand from the other solvent partners their shares—cannot demand whole from any one. Because he is a *creditor to each* for his share, *not to company*."

PRESIDENT.—"Suppose £19,000 of debt, and £12,000 of funds—Cannot come against the other partners for whole; but if any one insolvent, will draw from other a proportion of loss thereby sustained."

GARDENSTON.—"No ground for ranking them in their double capacity. The principle is this:—Creditor claiming on a bankrupt estate can be in no better case than individual person himself. Suppose those actions brought against Dunlop himself—could have had no

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*Pleaded for the Appellants.*—The company of Carlyle and Co. are not entitled to rank on James Dunlop's separate estate *pari passu* with the creditors of that separate estate. That company has its own proper estate to go to, out of which it must seek relief, and then come against the separate estates of its individual partners only after the creditors on that separate estate are fully paid. And it would be repugnant to every principle of mercantile law if the copartnership creditors were entitled, after exhausting the proper partnership effects, to come in and rank *pari passu* with the creditors on James Dunlop's separate estate. Each class of creditors ought to look to its own proper and separate estate, and ought to be preferable on that estate, before there be any claim allowed from the one estate to the other. The other position of the respondents is untenable, that they are entitled to rank on both sums of £12,000 and £17,000, and to claim a dividend referring to these, until they are paid the full sum of £17,000. But it is clear that a dividend made upon any sum is equivalent to full payment of that sum, and therefore £17,000 is all their demand; they cannot have a dividend for £29,000; but the view the Court has taken seems more correct, in allowing a dividend only on the £12,000, and to extinguish *pro tanto* the £17,000, and cre-

defence against payment of this company debt *in solidum*. But then suppose, *simul et semel*, the company pursue him for £12,000, he has the defence, that *I am* pursued for company's whole debt. If you relieve him, good and well. But if this to him a good defence, the creditors must have the same—entitled to be ranked for the £19,000 and not for £12,000."

MONBODDO.—"Suppose the reverse, that the company pursued for the £12,000."

GARDENSTON.—"Entitled to retain, till relieved of the £19,000."

COVINGTON.—"Same opinion as Lord Gardenston. Wrong formerly in supposing that he is not a creditor of the company for what he pays beyond his own proportion of company's debts."

GARDENSTON.—"If any payments be made out of Carlyle and Company's effects—these to be deducted from the £12,000, and he may then be ranked for the difference."

PRESIDENT.—"If balance reduced before £12,000, will insist to be ranked for the £12,000, or charge Dunlop with that sum."

COVINGTON.—"Liable for the £12,000 as debtor to the company; but likewise liable for debt of company. Suppose £12,000, and that £3,000 is his own proportion, then, by paying the whole, he becomes the creditor to company for £9,000."

dit being given for this and the other sums mentioned in the interlocutor, they should be allowed to rank for the balance. But even though this principle were to weigh against the appellants, the respondents not having proved the debt of £17,000 till the month of February 1773, ought not at any rate to be allowed to disturb the dividend declared in November preceding, and actually paid by the appellants to the greater number of the creditors before the claim was heard of. If admitted at all, it can only be on Dunlop's estate coming to hands after that period.

*Pleaded by the Respondents.*—Both the claims of £12,000 and £17,000 were justly due at the time of Dunlop's bankruptcy, and the company of Carlyle and Co. are entitled to rank on both sums on James Dunlop's estate *pari passu* with the creditors of that separate estate, to the effect of recovering the full amount of the debt due them. The result of this is, that they rank to the effect of recovering, in the first place, the £12,000 he owed the company, and over and above that sum his just proportion of the company's debts; but, in order to do so, they must rank, and ought to be allowed to rank, for the full sum of £12,000, and also for the full sum of £17,000 of debts due by Carlyle and Co. For the latter sum James Dunlop undoubtedly is liable for the whole, reserving to him his relief for what his estate may be called on to pay beyond his just proportion of these debts. The respondents ought, therefore, to rank for the £29,000 in the first ranking, and not for £12,000, as allowed by the Court; or, in the second ranking, he ought to be allowed to draw a dividend on the £17,000, and not on the balance merely, after drawing on the £12,000 claim.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed, with the following addition, viz. That no dividend, fairly made before notice of the respondent's claim, ought to be disturbed; but the respondents are to be paid up equal to the other creditors, before the other creditors receive any more.

For the Appellants, *Henry Dundas, Al. Wedderburn,  
Alex. Wight, Ar. Macdonald.*

For the Respondents, *E. Thurlow, Dav. Rae.*

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 LORD  
 FALCONER  
 v.  
 LAWSON.

 Lord FALCONER of Halkerton, - Appellant;  
 DAVID LAWSON, - - - Respondent.

House of Lords, 23d February 1778.

This case is similar to the case of the eight tenants, reported *ante* p. 373, which was reversed in the House of Lords, and remitted back to enquire on the facts by proof.

In the present case, the lease to the respondent bore to be for 57 years, “*in the option of the said David Lawson, and upon the provisions and conditions after-mentioned.*” The conditions aftermentioned were, that he should “renounce at Lammas, before expiring of the first nineteen years of this present tack, or prorogue the same for three years, in the option of the said Lord Halkerton and the said David Lawson.” The landlord gave notice of warning on expiry of the first 19 years, but to this the tenant did not consent, refused to remove, and contended that the option referred to in the lease was one which he alone fell to exercise, or in which his consent

July 27, 1774. was necessary. In this case the Court, of this date, “as-  
“soilzied the defender (the respondent), and decerned.”

Feb. 21, 1775. Upon reclaiming petition they adhered.

Against these interlocutors the landlord brought the present appeal to the House of Lords.

*Pleaded for the Appellant.*—The term of duration of the lease was 57 years, and granted under the “provisions and conditions aftermentioned.” These conditions were, that the tenant should “renounce at Lammas, before expiring of the first nineteen years of the tack or lease, or prorogue the same for three years, in the option of the said Lord Halkerton and the said David Lawson.” This plainly imports that the tenant should be bound to remove at the end of nineteen years, or remain for three years longer; that is, if the landlord insisted on his removing at the end of the first nineteen years, the tenant might, if he pleased, remain three years longer; and if, on the other hand, the tenant insisted to surrender at that time, then the landlord might insist on his remaining three years longer.

*Pleaded by the Respondent.*—The respondent alone has the option of determining the lease. The disposing clause must govern, and it gives him that option, which makes the present case different from the other tenants. The clause, “under the provisions and conditions aftermentioned,” does not refer to the duration of the lease, or the option to be

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exercised, but to the several prestations under it, and the intention obviously was, that if the tenant chose to give up his lease at the end of the first 19 years, the landlord, on notice given him to that effect, was entitled to insist on his remaining three years longer.

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v.

EARL

MARISCHALL.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be *reversed*.

For the Appellant, *Al. Wedderburn, Al. Forrester, Gilb. Elliot.*

For the Respondent, *E. Thurlow, Henry Dundas.*

NOTE.—Not reported in the Court of Session. This case, it was alleged, was different from the former with the other tenants. In the former case, the option was general, of which either of the parties might take the benefit. The clauses were different. There the leases were granted "for three 19 years," in the option of the said Lord Halkerton and the lessee. In the present case, the lease is made for 57 years, "in the option of the said David Lawson to "renounce at Lammas, before the expiry of the first 19 years, or "prorogue the same for three years, in the option of the said Lord "Halkerton and the said David Lawson."

*From Court of Exchequer in Scotland.*

GEORGE HALDANE, Esq. of Gleneagles, *Appellant;*  
GEORGE late EARL MARISCHALL, *Respondent.*

House of Lords, 26th March 1778.

APPEAL—COMPETENCY—JURISDICTION.—Held that an appeal to the House of Lords is incompetent, from a sentence of the Court of Exchequer acting ministerially as a Board of Treasury, under the special directions of an Act of Parliament.

Under the act 4 Geo. I. c. 8, those persons who had suffered loss and damage, through burning or pillage during the Rebellion, and who had remained loyal, were entitled to lodge their claim with the Commissioners of Forfeited Estates, who, upon the same being proved and sustained, issued debentures for payment out of the proceeds of the sales of these estates.

Two debentures were issued by the Commissioners, in terms of the act, one bearing date 6th October 1722, for £2502. 5s. 4d. sterling, in favour of David Haldane, Esq., for himself, and in right of his brother, John Haldane, Esq. of Gleneagles, and the other claimants who had assigned over their claims to him on account of the burning of the vil-

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lages of Blaeford, Auchterarder, &c.; and the other debenture, dated 25th July 1723, in favour of Andrew Brown and David Caws, for themselves, and in right of other claimants, for the losses sustained by the burning of Crieff, Muthill, and other places, amounting to £1831. 11s. 11d. These debentures came to belong to the appellant, who regularly presented the same in Exchequer in Scotland for payment.

The York Buildings Company purchased most of the forfeited estates. Some, by the indulgence of Government, were granted of new to the forfeited persons, but this always under burden of whatever claim any party might have against Government. The late Earl Marischall's estate was forfeited, in consequence of his joining in the rebellion of 1715, and was one of those purchased by the York Buildings Company.

And the question which arose in the Court of Exchequer in Scotland, will be seen from the facts set forth in the following judgment appealed to the House of Lords.

Aug. 3, 1777. "The Barons taking into consideration a petition from "George Haldane, Esq., praying payment of two debentures due to him, the one dated 6th day of October 1727, "for the sum of £2502. 5s.  $\frac{1}{2}$ d., and the other, dated the "25th July 1723, for the sum of £1831. 11s. 11 $\frac{1}{2}$ d., with "legal interest thereon, out of the balance of the price of "the estate of Marischall, and out of any other sums now "in the hands of the Receiver-general, arising from the "rents and profits of estates forfeited in the year 1715; "and upon hearing counsel, with George late Earl Ma- "rischall, who moved the Court that the interest on the "said debentures might not be found due; and upon hear- "ing counsel with the petitioners, and parties having re- "quested the judgment of the Court, whether interest on "the said debentures is due? The Barons disallowed the "prayer of the petition with regard to the interest on the "said debentures, and as to the payment prayed for out of "the balance of the price of the estate of Marischall, the "Barons, in regard the balance is not yet paid to the Re- "ceiver-general, make no order; and it appearing, from a "certificate from the Receiver-general, that there is now in "his hands the sum of £1407. 5s. 9d., arising from the rents "and profits of estates forfeited in the year 1715, the Barons "order the sum of £1300 to be paid to the said George "Haldane, to account of the sums in the said debentures."

The appellant appealed to the House of Lords against that

part of the above judgment, which disallowed interest on the debentures.

In the House of Lords answers were lodged to the appeal, stating "That it is not agreeable to the usage of your Lordships' judicature, or the law and custom of Parliament, to receive appeals from summary orders of the Barons of Exchequer in Scotland, (like the order in the petition and appeal set forth,) which are not made in any cause, and where relief by appeal is not provided by the statute of the 6th of her Majesty Queen Anne, establishing the Court of Exchequer in Scotland. The respondent, therefore, submits whether or not the appellant is proper in his appeal; and if it is your Lordships' judgment that the respondent should make a further answer to the said petition and appeal, he further answers, that the said order, so far as complained of, is agreeable to law and equity."

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*Pledged for the Appellant.*—On the competency of the appeal. The decrees and orders of the Court of Exchequer in Scotland before the Union, were subject to the review in the Parliament of Scotland. And when, by the 19th article of the Act of Union, it was declared "That there should be a Court of Exchequer in Scotland after the Union, for deciding questions concerning the revenue of customs and excise there, having the same power and authority in such cases as the Court of Exchequer has in England; and that the said Court of Exchequer in Scotland should have power of passing signatures, gifts, tutories, &c., in other things, as the Court of Exchequer at present in Scotland hath," it could not be intended that the new Court of Exchequer to be established in Scotland should have higher powers and more sovereign jurisdiction than the English Court of Exchequer, with respect to revenue matters, or the old Court of Exchequer in Scotland as to other matters. The act establishing the Court of Exchequer, 6 Anne, c. 26, does not say that the decrees or orders of this court shall be final in any case; but, on the contrary, authorizes writs of error issuing from the Court of Chancery, in those cases where they are practised in the courts of England; and adds, "That every person or persons against whom any orders and decrees in English causes, shall be made in the said Court of Exchequer in Scotland, shall and may have and pursue such, and the like relief and redress therein, as any person or persons against whom any orders or decrees of the Court of Exchequer in England have been, or shall be made, may have and pursue in like cases." These words

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 M'Dowal, vol.  
 ii. p. 537.

point out the remedy of appeal directly to the House of Lords in all equity cases before the Court of Exchequer in Scotland. The nature and extent of the jurisdiction of this court, and the matters and things cognizable there, are defined in the preceding clauses of the statute, and it was certainly never meant that in any matter whatever, this court, more than the Court of Session, should be withdrawn from the supreme authority of Parliament.—Accordingly, the writers on the law of Scotland have understood, and laid it down as a clear proposition, that, besides the *writ of error* in revenue causes, an appeal lies in all other cases to the House of Lords. Thus the learned judge by whom the Institute of the Law of Scotland was composed, says, “Where any person conceives himself aggrieved by the proceedings of the Court of Exchequer in relation to signatures, gifts of *ultimus hæres*, &c., or the like, he may sue a writ of appeal in the House of Lords, in the same manner as in appealing from decisions from the Court of Session.”

There is no sound distinction between summary determinations of the Court of Exchequer upon applications to them by petition, and those given in a more formal manner upon regular suits. No such distinction has ever been understood in the law or practice of the Court. Upon the merits, it is equally clear, besides being equitable and just, that the appellant should be allowed interest on his debentures.

 13 Geo. I. c.  
 28, and 1 Geo.  
 II. c. 21.

*Pleaded for the Respondent.*—The order appealed from was not made by the Barons of Exchequer in a judicial proceeding, either at law or in equity, but ministerially only, in execution of the decrees of the Commissioners, as a duty laid on them by special acts of Parliament. None of those acts confer upon the Barons of Exchequer the least mark of judicial power, which is wholly given to the Commissioners, subject (as matters of claims upon the estate) to the review of the delegates, whose sentence is, by 4 George I., made absolutely final. Thus the legislature have declared where, and where only appeals should be brought. Upon the rights affecting these forfeitures, it seems impossible that orders made by the Barons of Exchequer, in execution only of such sentences, which the acts require them strictly to obey, can be other than final, else there would be another appellate jurisdiction introduced in these matters other than that positively ordained by the acts of Parliament; and this in a manner, which, by the act, is not subject to the review even of the delegates,—the Commissioners' award to sufferers for their losses being final.

After hearing counsel, it was  
Ordered and adjudged that the appeal be dismissed, the  
same being incompetent, from the Barons of Exchequer  
acting ministerially as a Board of Treasury, under the  
special direction of an act of Parliament.

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TAIT  
v.  
KEITH, &c.

For Appellant, *Henry Dundas, Al. Wedderburn, C. Dundas.*

For Respondent, *E. Thurlow, Al. Forrester.*

NOTE.—In this case, the appellant founded on several cases in arguing for the competency of the appeal. In particular, the case of the York Buildings Company *v.* His Majesty's Advocate, acting for his Majesty's and the public interest, and the Creditors upon the Estate of George late Earl Marischall, decided 23d April 1777, (House of Lords.) There were various questions of accounting between the York Buildings Company, who were purchasers of the forfeited estates, and those having interest in the price; and certain orders and decrees of the Barons of Exchequer fixing disputed points had been pronounced, when an appeal was taken to the House of Lords from the Court of Exchequer in Scotland. But it does not appear from the printed appeal case, that His Majesty's Advocate stated any objection to the competency of the appeal, and the discussion was confined entirely to the merits.

It was ordered and adjudged that the appeal be dismissed, and that the several orders therein complained of be affirmed.

The competent course in seeking a review of the sentences of the Court of Exchequer, is by *writ of error* to Parliament.

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[M. 9938.]

Rev. Mr. THOMAS TAIT,	- - -	<i>Appellant;</i>
Mr. GEORGE SKENE KEITH, Minister, and	}	<i>Respondents.</i>
Others, - - - -		

House of Lords, 30th March 1778.

PATRON—COMPETING PRESENTATIONS—MANDANT'S POWERS— IMPLIED RECAL.—Where a patron, residing in a foreign country, had appointed commissioners, with powers to present to vacant churches, the latter presented a party a day before the patron himself presented another party: Held, the presentation by the commissioners, in virtue of the powers delegated to them, was good, and to be preferred to the patron's own presentation, and that the right of patronage may be exercised by delegates so appointed.

George Keith, Earl Marischall, was patron of the parish church of Keith-hall, Aberdeenshire, and having become

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vacant by the death of the incumbent, the appellant obtained from his Lordship a presentation, duly signed by him, on the 10th May 1776.

In consequence of a power and commission granted by the Earl to Alexander Keith the elder, and Alexander Keith the younger, of Ravelston, the respondent received a presentation to the same church and parish from them, acting for the Earl, and as duly empowered in that respect, dated 9th May 1776. Both presentations were served on the same day on the presbytery. And the question came to be, which of the two was entitled to be preferred and sustained?

Jan. 22, 1778. The Court pronounced this interlocutor:—"Find that "Messrs. Keiths, elder and younger of Ravelston, having "full and special powers, by commission from George Keith, "late Earl Marischall, to grant presentations to parish "churches, whereof he is patron, in the same way and man- "ner as he could do himself; and having granted a presen- "tation, as commissioners, to Mr. George Skene Keith, "preacher of the Gospel, to be minister of the united pa- "rishes of Keith-hall and Kinkell, which was prior to the "presentation to the same parish, granted by the said George "Keith, late Earl Marischall himself, in favour of Mr. Tho- "mas Tait, second minister of Old Aberdeen, therefore, in "a competition betwixt these two presentations, find the "presentation to Mr. Skene Keith preferable, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The right of presentation cannot in law be exercised by commissioners or attorneys, but only by the patron vested with the right to present; the presentation, therefore, on the part of the Earl Marischall's attorneys was inept. And even if valid at all, it cannot stand in competition with a presentation under the Earl Marischall's own hand. The very fact that he presented a different party, necessarily implied a recall of that commission, and a presentation by the patron himself granted only a day after the one by the attorneys, ought to be preferred.

*Pleaded for the Respondent.*—It is the established law of Scotland that a patron may exercise his right of presentation by means of commissioners, empowered in the special manner Messrs. Keiths were in the present case. The commission, therefore, not having been recalled, and the commissioners having acted under special powers, and in absence of the patron, the presentation by them was, to all intents

and purposes, a good presentation, and must, moreover, be held in law to be the act of the patron; and, consequently, being prior in date to that in favour of the appellant, the respondent is entitled to be preferred.

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EARL OF  
SELKIRK, and  
DUKE OF  
HAMILTON

v.

DOUGLAS, &amp;c.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *E. Thurlow, Henry Dundas.*For Respondents, *Al. Wedderburn, Ar. Macdonald,  
Dav. Rae.*

[M. 4358, 10962, 12350.]

EARL OF SELKIRK, - *Appellant in first Appeal;*DUKE OF HAMILTON, MARQUIS OF }  
DOUGLAS, EARL OF ANGUS, &c. } *Appellant in second Appeal;*ARCHIBALD DOUGLAS, Esq. *Respondent in 1st and 2d Appeals;*EARL OF SELKIRK, - *Respondent in second Appeal.*House of Lords, 8th March 1777, 14th April 1778,  
27th March 1779.\*

**ENTAIL—CLAUSE OF RETURN—PROHIBITORY CLAUSE—FIAR—NEGATIVE AND POSITIVE PRESCRIPTION—SASINE—REVOCATION—CONVEYANCE—“HEIRS WHATSOEVER”—COMPETENCY OF PAROLE TO EXPLAIN THIS CLAUSE—HEIR ENTITLED TO CHALLENGE ON DEATHBED.**—The ancient investiture 1630 restricted the destination of the family estates of Douglas to the heirs-male of Archibald Lord Douglas' body; “whom failing, to return to the Earl of Angus “his father, and his heirs-male and of tailzie,” with prohibition to alienate or to contract debt; but no prohibition against altering the order of succession. Several deeds were executed by Marquis James Douglas, one of 9th March 1699, which confined the succession to heirs-male, and favoured the succession of the Earl of Selkirk as such. A subsequent deed, 11th March 1699, introduced heirs-female, together with one executed on 28th October 1699, and others of 1716, 1718, and 1726. He afterwards revoked these by deed 16th October 1744, and declared that his estates and honours should descend to the heirs of ancient investitures. The Duke of Douglas (the Marquis' son) afterwards executed a deed or contract of marriage, 1759, which called, after heirs-male of his own body, “*his own nearest heirs and assignees* “*whatever*.” On deathbed he executed a deed (1761) calling the heirs whatever of his father, which included Lady Jane

\* There are two separate appeals here:—the first, between Mr. Douglas and the Earl of Selkirk, in which the latter was appellant, and disposed of 8th March 1777; the second, between the Duke of Hamilton and Mr. Douglas and Earl of Selkirk. They are placed together, as they involve the same narrative of fact and law.

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*v.*  
**DOUGLAS, &c.**

Douglas and her son, the claimant. Held, in the Court of Session (1.) That the clause of return, and the prohibitory clause in the entail, did not prevent Marquis James, who was heir, from gratuitously altering the order of succession. (2.) That the clause of return, and prohibitory clause, were cut off both by the negative and positive prescription, on the title and possession had thereon under the charter 1698. (3.) That the deed of nomination of 11th March 1699, and subsequent deed of 28th October 1699, is the nomination of heirs referred to in the charter 1707, and consequently the Earl of Selkirk's claim, under the deed 9th March 1699, was ineffectual, and lost by the negative prescription. (4.) That the objection to the sasine 1707, on account of the witnesses not signing each page of the deed, was not good in this case. (5.) That the possession had, on this charter and sasine, entitled Archibald Douglas, the present claimant, to the benefit of the positive prescription, against the restrictions in the contract of marriage 1630, and the deed of nomination, dated 9th May 1699. (6.) That the deed 1744 was no proper or legal settlement of the land estate, but a revocation or deed merely of a testamentary nature, incapable of conveying land estate; and that the appellant the Duke of Hamilton has no claim under it; and further, that the marginal note, consisting of the words "and *female*," as it appears upon the face of the said original deed of October 1744; and the words "*after my death*" made no difference in the question. (7.) That by the legal import of the terms "*heirs* and *assignees whatsoever*," in the Duke of Douglas' contract of marriage 1759, heirs of line were meant, and Archibald Douglas, as heir of line, was called to succeed in preference to the nearest heir-male. (8.) That parole evidence was incompetent to give a different meaning to this clause of destination. (9.) And that it was incompetent for the Duke of Hamilton or Earl of Selkirk to object deathbed to the deed 1761, executed by the Duke a few days before his death, this deed being executed in virtue of a reserved faculty, and they not being in the position of heirs entitled to challenge on that ground. Affirmed in the House of Lords.

The decision in the Douglas cause, as reported, *ante*, p. 143, established the right of Archibald Douglas, Esq. to the status of Lady Jane Douglas' son, by her marriage with Colonel Sir John Stewart; and, of consequence, his right to succeed as heir of line, or heir-female, under the destination of "*heirs whatsoever*," of Marquis James, his grandfather.

The Ducal title became extinct by the death of the Duke of Douglas. The other titles and honours, viz. The Marquisate of Douglas and Earldom of Angus, devolved on the Duke of Hamilton, as nearest heir-male of the family;

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\* Mr. Douglas was afterwards elevated to the Peerage, as Baron Douglas of Douglas, in 1790.

and the present various questions were raised in regard to the succession to *certain* parts of the Duke of Douglas' estates.

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The Duke of Hamilton claimed the estates of Angus, Dudhope, Bothwell and Wandell, in the character of heir-male general and of provision.

Archibald Douglas claimed the whole in the character of heir of line, and likewise of entail and provision to the Duke of Douglas, and to James, Marquis of Douglas, the Duke's father.

The Earl of Selkirk claimed the Earldom of Angus and Dudhope, as heir of entail and provision.

The state of the titles to the honours and estates stood thus:—

William, Earl of Angus, in 1601, enjoyed the estates of Douglas and Angus, under a simple destination to heirs-male. The estates were known afterwards under the general name of Earldom of Angus.

He married twice. By his first marriage he had two sons, *Archibald* and *James*, and three daughters. By his second wife he had three sons,—William, Earl of Selkirk, afterwards Duke of Hamilton, (from whom the Duke of Hamilton and Earl of Selkirk, two of the claimants, are descended),—George, Earl of Dumbarton, and James, and several daughters.

In 1630, Archibald Lord Douglas married Lady Anne Stewart, on which occasion, *his father*, Earl William, became a party to his marriage contract, and bound himself, in consideration of the tocher given by the Lady, “to infect and “seize by charter and sasine, *titulo oneroso*, in due and competent form, the said Archibald Douglas, and the heirs-male lawfully gotten, or to be gotten of his own body; which failing, to return to the said noble Earl of Angus, his father, and his heirs male and of tailzie contained in the infection of the Earldom of Angus, and their assigns whatsoever, under the reservations and other provisions and restrictions aftermentioned.” In this deed the Earl reserves his own liferent, and it contains a clause prohibiting the said Lord Archibald Douglas and his foresaids, “to sell, annalzie, wadset, dilapidate nor put away any of the lands and others above written, nor to contract debt, nor do any other deed whereby the same may be evicted, by ap- prizing or any manner of way, from his foresaids, without the special advice and consent of the said noble William, Earl of Angus, during his life, first had and obtained.”

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But this deed contains no prohibition against altering the order of succession.

Nor did the charter and infestment which followed thereon, contain the prohibitory clause, although the charter repeated the clause of return. It was upon this deed that the Duke of Hamilton founded his claim.

In 1633, Earl William, the father, was created Marquis of Douglas, upon which event, his son, Archibald Lord Douglas, took the title of the Earl of Angus. Of the latter's marriage with Lady Anne Stewart there was issue one son, *James*, afterwards Marquis James Douglas. But before he succeeded, several deeds were executed. In the first place, upon the death of Lady Anne Stewart, the Earl of Angus married a second time, and on this occasion, and *without* the consent of his father, he settled the estates of Bothwell and Wandell, part of the family estates, on the *heirs-male* of the marriage, under condition of *return* as aforesaid,—failing heirs male. Of this marriage, there was one son, *Archibald*, afterwards created Earl of Forfar.

Archibald, Earl of Angus, died before his father Marquis *William*, who observing that under the above deed of his son, the conditions of the entail, clause of *return*, and prohibitions, were violated and disregarded by him, executed a new deed, conceiving the estate as still in him in fee, whereby "he disponed the estate to the said James (his grandson) "now Earl of Angus, and only son of the first marriage of the "said Archibald, Earl of Angus, deceased, and the heirs- "male of his body; whom failing, to the heirs-male of his "father's body; whom failing, to the heirs male of the "Marquis' own body; whom failing, to return to the Mar- "quis, his heirs male and of tailzie, contained in their infest- "ments of the Earldom of Angus, and their assigns what- "soever." There was a general reference to the conditions and provisions in the contract of marriage 1630, and the object of the deed was to place the settlement of the succession on *that deed*. On this deed the Earl James was infest, but the prohibitory clause in the deed was not inserted.

1660.

Of this date, Marquis William died, and was succeeded by the said James, who became Marquis James Douglas, and who made up his titles by special service, not under the last deed of his grandfather, but to his own father, as his heir male, on the assumption, that he was infest in the fee of the estates by the marriage contract in 1630. His retour between the prohibitory clauses in the latter deed, in order to protect against the debts which his father had contracted.

Marquis James, out of respect to his father Lord Archibald's intentions towards the issue of his second marriage with Lady Wemyss, and agreeably with, and in implement of the obligation undertaken by his father in that contract of marriage, disposed to the Earl of Forfar, his brother consanguinean, and the heirs male of his body, whom failing, to return to the said Marquis' heirs male and successors whatsoever, the two baronies of Bothwell and Wandell, upon which he was infest.

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It was upon this, Marquis James' right, that Archibald Douglas, Esq. founded his claim, contending that he had in him the absolute fee of the whole estates, which not only entitled Marquis James to make the deeds after mentioned, but also to make the estates descend to him as heir of line, in preference to *heirs male*, there being no prohibition in the previous investitures against altering the order of succession.

Marquis James was twice married. Had issue by the first, who died unmarried. By the second he had issue, a son, Archibald, the late Duke of Douglas, and Lady Jane Douglas, who was the respondent Archibald Douglas' mother.

By his two marriage settlements with these ladies re-1670 and respectively, the first 1670, the second in 1692, Marquis James <sup>1692.</sup> conveyed "to his *heirs male* of the marriage, whom failing, "to his other heirs male to be procreated of any other marriage; which failing, to Archibald Earl of Forfar (his brother) and to the heirs male of his body; which failing, "to William Duke of Hamilton, his uncle, and to any son procreated, or to be procreated of his body, not succeeding "to the estate and Dukedom of Hamilton, whom he shall "design and nominate by a writ under his hand; and failing "of any such designation, to the second son of the said Duke "of Hamilton, and the *heirs male* of his body not succeeding "to the estate of Hamilton; which failing, to the third "son of the Duke, &c., whom all failing, to his own nearest "lawful heirs and assignees whatsoever." He reserves power to alter, and to tailzie.

From the whole of these deeds, as well as the one quoted below, and every act and deed up to its date, it was contended by the Duke of Hamilton that a manifest preference was given by the investitures to the heirs male, to the exclusion of heirs female, or heirs of line; and as Archibald Douglas was only an heir female, being the son of Lady Jane Douglas, of her marriage with Sir John Stewart, he was not entitled to succeed.

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But Marquis James executed in 1699 another deed, resigning the Earldom of Angus and the other family estates (Dudhope excepted) "to his son Archibald, and the heirs male of his body; which failing, to Archibald Earl of Fife, far his brother, and the heirs male of his body; which also failing, to Lord Basil Hamilton, second son to the deceased Duke of Hamilton, and the heirs male of his body; which also failing to second son, to James now Duke of Hamilton, and the heirs male of his body; which failing, to the next lawful son of James Duke of Hamilton, and the heirs male of his body; which all failing, to his next heirs whatsoever, heritably and irredeemably." He bound himself never to revoke or alter the tailzie above mentioned. And it was under this title that the appellant, the Earl of Selkirk, claimed as the younger branch of the Duke of Hamilton's family here designated. The only power reserved being to grant provisions.

But after this date, a new line of succession was introduced, by admitting heirs female.

Mar. 11, 1699. This was done by a deed, whereby he nominated and appointed, that "failing the heirs male of his own body, the eldest heir female of the body of his son, the said Lord Angus, and the heirs whatsoever of the body of the eldest of the said heirs female, which failing, the eldest heir female of his own body; which failing, the said Archibald Earl of Forfar his brother, and the heirs male of his body; which failing, the nearest heir male whatsoever; which failing, his heirs or assignees whatsoever should succeed, failing heirs male of his body, as said is, in the Earldom of Angus and others, in the deed 1697." This deed also disposes Dudhope to the same series of heirs, and likewise the titles and honours of the family.

Under his deed the issue of Lady Jane Douglas, on failure of her brother the late Duke of Douglas without heirs male, was entitled to succeed. Whereas, the Earl of Selkirk contended, that as this deed was in fraud of the marriage contracts, executed by Marquis James in 1670 and 1692; and also of the tailie of 9th March 1699, he had power to execute the same, and are therefore invalid, and that the deed he made on 11th March 1699, in favour of heirs female was impetrated from him while in sickness.

But this deed itself was revoked by a revocation or declaration executed on 15th June 1699, which was again superseded and altered in its turn by Marquis James executing an entail, of this date. It recites the disposition to his

Oct. 28, 1699.

son Lord Angus 1697, and deed of nomination of 11th March 1699 confirms the same, and thereby “irrevocably nominates” and appoints, that failing heirs male of our body, the eldest heir female of the body of the said Lord Angus, and “the heirs whatsoever of the body of the said heir female; which failing, *the eldest heir female of our body, and the heirs whatsoever of the said eldest heir female*; which failing, Archibald Earl of Forfar, our brother, and the heirs male of his body, which failing, to our heirs male whatsoever; which failing, our heirs and assignees whatsoever shall succeed, failing heirs male of our body as said is, to the Earl of Angus, and haill other lands contained in the said disposition.” This deed advanced the female line, or Marquis' own daughter, Lady Jane Douglas, and the heirs of her body, in the order of succession, before the Marquis' own brother, the Earl of Forfar; and the destination goes no further, and does not, as by the former settlements, confine the succession to heirs male, nor extend the substitution of that line beyond his own brother, to the Duke of Hamilton's family of the younger branch.

The Marquis James died of this date, leaving his son Archibald, the late Duke of Douglas, and Lady Jane Douglas, his only daughter, the son being created a Duke of this date, although then a minor. He completed this title by charter and sasine in 1707, which refer to the deed of nomination of heirs on 11th March 1699.

The Duke had no issue of his marriage. By deeds executed in 1716, 1718, and 1726, he confirmed the settlements of his estates as above, namely, failing heirs of his body, he settled them upon his sister, Lady Jane and her heirs, and certain other substitutes. He afterwards revoked these settlements by a simple deed of revocation, 16th October 1744, declaring, in the same deed, that on failure of heirs male and female of his body, his lands and estate, and heritable offices, were to descend to, and continue with the heirs of the ancient rights and investitures of the same; and therefore he revoked and recalled all and whatsoever deeds and settlements preceding this date. The Duke of Hamilton alleged that this deed was a settlement in favour of heirs male, and gave him a title to reduce the deed aftermentioned, on the head of deathbed. Again, in October 1754, after Lady Jane's death, he executed a deed, settling his estates, failing heirs male of his own body, upon his next heir male, the Duke of Hamilton, whom failing, the heirs female of his body. This deed was confirmed by

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1703.

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Aug. 6, 1759.

July 11, 1761.

July 21, —

another in 1757, which expressly excluded Lady Jane Douglas' issue. On his marriage the Duke of Douglas settled the lands and estate on the "heirs male of "his marriage, whom failing, upon the heirs male of the said "Duke in any subsequent marriage; whom failing, upon "the heirs female of this present marriage, the eldest "daughter or heir female always succeeding without divi- "sion, and secluding her younger sisters as heirs portioners; "whom failing, to such heirs as he hath or shall name and "appoint in the settlement of his estate, made, or to be made "by him, and failing thereof, *to his own nearest heirs and as- signees whatsoever.*" On deathbed he also executed an en- tail "to and in favour of himself and the *heirs whatsoever* of "his body; whom failing, *to the heirs whatsoever* of the body "of the deceased James Marquis of Douglas his father; whom "failing, *to Lord Douglas Hamilton, second son of the Duke "of Hamilton,*" &c. This, and the deed immediately before it, superseded the deeds 1754 and 1757; and on the Duke's

death, which happened of this date, they were accordingly found in his repositories with the signatures cut away, and marked cancelled: but the deed of revocation of 6th October 1744 was found uncancelled in his repositories.

Archibald Douglas, Esq. maintained that the investitures since Marquis James' death in 1700, with one single exception, down to the Duke of Douglas' death in 1761, expressly bore the estates as conveyed, on failure of heirs male of his body, to the heirs female, or heirs whatsoever of their body; and that he, as heir of line of Marquis James, and heir female, on failure of heirs male of his body, and as heir whatsoever of Lady Jane Douglas, was entitled to the whole estates. That the only exception to this unbroken title, upon which the Duke possessed for sixty-one years, was the deed of revocation of 1744: but as this deed was a mere declaration, it could not have the effect of a deed conveying heritable estates, nor even of a settlement inferring an obligation to implement.

But the Duke of Hamilton entered more fully into the discussion. He contended, 1st, on the investitures, that by the clause of return, and prohibitory clause in the contract of marriage 1630, the heirs male of Archibald Earl of Angus' body were disabled from gratuitously preventing the return stipulated in that contract to Marquis William and his heirs male, and from altering the order of succession thereby established. Succession to land estates may, by the law of Scotland, be settled in three different ways, 1. By simple

destination; 2. Under prohibition to alter; 3. Under irritant and resolutive clauses. The last kind had not received the sanction of the law, and was hardly known in 1630. Prohibitions were the strongest guards to such settlements. Prohibitions may be either expressed or implied. Instances of the latter were tailzies for onerous causes, tailzies mutual, and tailzies containing clauses of return to the maker and his heirs. In none of these can the settlements be disappointed by gratuitous deeds. In the case of a clause of return, the grantor gives his estate under that condition; the condition therefore is onerous, and may be said to be purchased at the price of the whole estate. The clause of return in the deed of 1630 could not be defeated in this case by any subsequent gratuitous deed. And its binding effect has been decisively established by the authority of lawyers and several decisions. Neither does it make Sir George any difference that William Marquis of Douglas was only settling his estate on the heir *alioqui successurus*. Lord Mackenzie, p. 458; Dirleton, *voce Return*; Douglas had no right to the estate during his father's life. M'Dowall, vol. 1, p. 592, and 595; Erskine, and when he disposed it to his son free during his own life, p. 370. Waddell v. Waddel, Jan. 16, 1739, *voce Minor*. The son could not take it up but *sub forma doni*. The prohibitory clause, though it respects only the power of selling, gives additional force to the clause of return: for the Marquis would not have prohibited the heirs to sell, if he had not understood that he had restrained them from altering the order of succession, which was of much more importance to his family, and more agreeable to his views. The whole circumstances shew the purpose and intent to secure the estate to the heirs of investiture, or heirs male, in preference to heirs of line.

2. Prescription. Nor can the clause of return in the contract 1630 be lost by the negative prescription. No doubt, in the charters 1698 and 1707 this clause of return is not repeated. But the heirs of the contract 1630 had no occasion to challenge this, so long as no positive act or deed was done to intercept their right of succession in those events in which the return was to operate in their favour. And though it should be admitted that one or other of the nominations of 1699 was referred to in the charter 1707, and made a part of it, yet the positive prescription could never begin to run in favour of such deeds, nor the negative prescription against the titles of the heirs male to challenge them, till by some overt act, it was published and known that such deeds had been granted. Further, the Duke, by these nomina-

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tions in 1699, was laid under harder fetters than the reasonable clause of return to the heirs of his honour and dignity; so that all the right he acquired by his prescription was being tied down to one set of heirs in place of another, consequently there could be here no *adjectis dominii*, which is the definition of prescription.

3. Objection to sasine. The sasine on the deed 1707 was written bookways, and the witnesses not having signed each page, as directed by the act 1686, the Duke of Hamilton further contended that it was null, and consequently that no prescription could be founded on said charter and sasine.

4. Point of revocation. He further insisted, that the revocation 1744, which remained uncancelled and subsisting at the Duke of Douglas' death, and which proceeds on this narrative: "To the end that failing of the heirs of his own body, his lands and estate, heritable offices and jurisdictions, may descend and continue with the heirs of the ancient rights and investitures of the same," ought to be construed as a deed of settlement; or at least, as an indication of the Duke's will with respect to the person entitled to take his succession under the penult branch of the contract of marriage 1759, viz. the heirs whom the Duke had named or should name, &c., because, when a faculty is reserved to appoint heirs, no *verba solemnia* are necessary for exercising that faculty. It is enough if the person's will be signified by any authentic deed. *Vide* Henderson, 31 January 1667, *voce* Testament; Sir John Kennedy of Culzean *v.* Arbuthnot, No. 22, p. 1681; Simpson *v.* Barclay, see Append. 11th Dec. 1751.

5th Point. Construction of "heirs whatsoever," and competency of proof to explain this term. Laying aside the deed 1761, as executed on deathbed, and if the succession was to be regulated by the immediate preceding deed, viz., the contract of marriage 1759, the person entitled to take the succession, under the last substitution of heirs and assignees whatsoever in said contract, was the heir of the former settlements and investitures, which his Grace intended to be the heir male, and, in aid of this construction, a condescendence of facts was given in for him, tending to shew that the Duke of Douglas had no intention, under this termination of the settlement in the contract of marriage to call his heir of line; that the person in view must have been the heir of the ancient investitures, and of the honours and dignities of the family. And of this condescendence a proof was craved. In support of this proof the Duke of Hamilton

argued, "that the term heirs whatsoever," has no fixed invariable signification in the law, but is a general and flexible term, which must be explained according to circumstances. For the most part, this term is understood to denote the heir of line, or heir general, but, from the circumstances, it may also be descriptive of particular heirs. Its signification depends upon the intention of the user, and points out those heirs, who, from the circumstances of the case, appear to have been designed to be called to the succession. The reason why the heirs of line are generally meant by the expression "heirs whatsoever," is, that heirs of line are always presumed, unless a contrary intention appears; so that still intention is the rule. Sometimes these words denote all kinds of heirs. Thus, where one obliges himself and his heirs whatsoever, he obliges all his representatives in their order, and under this general description, the creditor will be well founded in his action, not only against the heir of line, but against the heir of provision, and against his executor. In like manner, where a right is taken to one, and his heirs whatsoever, the interpretation varies according to circumstances. *In feudo novo*, it signifies heirs of conquest; *in feudo antiquo*, heirs of line; and *in mobilibus*, an executor. In an heritable bond, with a clause of infestment, these words carry the subject to the heir of line; but if the creditor has charged his debtor with charge of horning, heirs whatsoever become executors. In bonds of corroboration, wherein principal sums and annual rents are accumulated, and both principal sums and annual rents are taken payable to heirs and assignees whatsoever, it has been found, that these words signify both the heir of line and the heir of conquest, and as to the annual rents, the executors; and thereby the same words in the same deed, carry different parts of the estate to different heirs: Marquis of Clydesdale *v.* Dundonald, Jan. 1727, No. 3. 1262; Duke of Hamilton *v.* Earl of Selkirk, 8th Jan. 1740, *voce* Heritable and Moveable; Scott *v.* Scott, Jan. 1665, *voce* Presumption; Skene, 31st July 1725, *voce* Presumption; Hay *v.* Crawford, 16th Nov. 1698, *voce* Succession; Farquharson *v.* Farquharson, No. 43. p. 2290; M'Dowal *v.* M'Dowal, Feb. 1727, *voce* Provision to Heirs and Children; Stair, *voce* Heirs, § 12; M'Dowal, v. ii. p. 330, § 27; Erskine, p. 368, § 20.

The Duke of Douglas had no intention to call his heir of line, but all along meant to favour the heir of his honours and ancient investitures, appears from the whole tenor of his settlements, and from the circumstances of his family; and

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the same can be put beyond doubt, if a proof is allowed of the condescendence. This will not be taking away written evidence by witnesses. The purpose of the proof is to discover from circumstances, the sense and intention of a phrase of doubtful signification. It is not to destroy or take away the deed, or to explain it. Parole evidence was allowed by the Roman law in such cases, L. 69. ff. de legat. 3; and by our law, nothing is more common than to allow a proof by witnesses, of facts and circumstances inferring payment, or any other matter which could not have been the subject of direct proof by witnesses, 3d Feb. 1697, Drummond observed by Fountainhall, *voce Proof*.

To this it was answered by Mr. Douglas the respondent.

1. That as the respondent was the heir of line of the Douglas family, he has favour on his side; and the presumption of law is for him, agreeable to the opinion of Lord Stair, Title Heirs, § 35, and Sir Thomas Craig, lib. 2, dieg. 16, § 12. The clause of return, in this case, is merely a substitution. The words "which failing to return" have no charm in them. The effect would have been the same, had the words been "which failing, to the granter and his heirs." And, accordingly, in the charter following on the contract, the words are "Quibus deficien. præfato prædelecto," &c. The person in whose favour a return is stipulated, takes the estate by a service, as heir to the person last intest, is subject to his debts and deeds, and is, in every respect, a substitute. Such returns, therefore, receive their effect not from any particular form of words used in the deed, but from the nature of the deed in which they occur. When a man freely and gratuitously alienates his estate, or any part of it, to a stranger, from himself and proper heirs, as all donations are strictly to be interpreted, he is not understood to grant more than he has thought proper to give in express words, and when, in such a deed, he stipulates a return of the estate to himself, in any particular event, though conceived in the form of a simple substitution, he thereby gives away his estate *sub modo*; and it becomes an implied condition in the grant, the granter or his heirs shall not disappoint the return to the granter or his heirs, when the same opens to them in the course of succession; in the same way as in the case of mutual tailzies, or tailzies for onerous causes, though they contain no express prohibitory clause, it is implied in the transaction itself, that the succession cannot be disappointed by any gratuitous deed. But, for the same reason, and upon the same principles, where a man, under a

previous obligation, for an onerous cause, to dispone his estate, does, in implement of that obligation, grant a disposition, containing a clause of return to himself in a certain event, such clause can have no stronger effect, than a substitution in a simple destination of succession, and which will be defeasible by the disponee, or by any of the substitutes at pleasure. In the former case, the return is the *modus* or condition of the grant; and the will of the granter must be the rule. But, in the latter case, the conditions inserted in the disposition are the act of the disponee. He could have regulated the destination as he thought proper. It was a matter of favour in him to give the disponee any place in the settlement; and, therefore, he cannot be understood to have laid either himself or his heirs under any fetter. As, therefore, it is evident that the clauses of return do not receive their force or efficacy from any form of words, but must receive their construction from the nature of the deed, and the intention with which they were put in, the question is, whether in a settlement of a man's succession upon his heirs, who are to represent him, such clause can imply any thing more than a naked substitution. When a person gives away his estate from himself and proper heir, though to a younger son, it is an alienation. The younger son is, in the eye of law, a stranger; and a substitution in favour of the granter himself and his heir, is understood to be a condition of the grant, implying a prohibition on the donee and his heirs to do no deed to defeat it. But when he settles his estate upon his own proper heirs, this is no alienation. A man's heir is, in the sense of the law, *eadem persona* with himself; he possesses the estate not upon singular titles, but as the representative of the deceased, and even though the settlement takes place in the granter's life, this is only *præceptio hereditatis*. In the case of lands holding ward, such a disposition, though without consent of the superior, did not infer recognition. As such deed, therefore, is not understood an alienation, but a settlement of the estate upon the proper heir, who, independent of the deed, would be entitled to take and hold it, the meaning of the grant will fall to be most benignly interpreted; nor will any fetters be brought upon him but such as are clearly expressed. The distinction here pointed out is clearly established by the decisions, Duke of Douglas *contra* Lockhart of Lee, No. 31, p. 4343, M. &c. Some of the authorities appealed to, on the other side, do not prove the point for which they are adduced; others respect bonds of

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provision to daughters, which are plainly of the nature of donations, and where the return must be understood as a condition of the gift. The prohibitory clause does not enter at all into the question, as it limits only the power of selling and contracting debt, and was likewise at an end by Marquis William's death.

2. Prescription. The next question was, Whether, supposing the clauses in the contract 1630 amounted to an express prohibition to alter the order of succession, the same were not cut off and at an end, both by the negative and positive prescription?

The prescription in this case is founded in the express words, both of the acts introducing the negative prescription, and in the act 1717 concerning the positive prescription. The Duke of Douglas was infest in the estate of Angus, as far back as 1698, upon a charter under the Great Seal, proceeding upon the disposition 1697, containing no prohibition or clause of return or other limitation whatever. In like manner, the charter of infestment 1707, referring to a nomination of Marquis James, in favour of a different series of heirs, contains no limitation or clause of return in favour of collateral heirs male. Upon these titles the Duke possessed his estate, without molestation or challenge from the family of Hamilton, or any other heirs male, who would have been entitled to the succession, upon the marriage contract 1630. Such titles and possession, undisturbed for a half century, were sufficient to secure the Duke's rights under those infestments, as an unlimited fee by prescription, and to work off the fetters of any former tailzies or limitations. This is now an established point by decisions: case of Auchlinkart, 31st Dec. 1695, *voce* Prescription, M. ; Mackerston, 10th July 1739, Ibid ; Douglas of Kirkness, 3d Feb. 1753, M. 4350 ; Ayton *v.* Monypenny, *voce* Prescription.

3. Objection to sasine. The statute 1686, on which the objection to the sasine 1707 is founded, seems to have been altered by the act 1696; and accordingly the objection has been repelled by the Court of Session as often as it has occurred. And upon a search, it has been found that, in practice, since the year 1696, the bulk of the sasines in Scotland are only signed by the witnesses on the last page, agreeably to the provision of the statute 1696.

4th Point. Revocation 1744. Supposing this writing could be construed as a deed of settlement, it does not appear upon what ground it could be a settlement in favour of the Duke of Hamilton. From the tenor of the deed it-

self, it appears that the ancient rights and investitures are put in opposition to the deeds of settlement which the Duke had executed himself. He only revokes all deeds and settlements made by himself, declaring the same to be null and void, as if he had never granted the same; which is saying in plain words, that his succession was to go in the same way as if he himself had never executed any deed. In which view, it is plain that if this revocation is to be construed a deed of settlement, the persons entitled to claim under it are the heirs of the charter and sasine 1698, and subsequent nomination 1699 and charter 1757, consequently the respondent would be, in the event that has happened, the heir called in this deed. What further shews this, is that the reservation bears the Duke's intention to make way for his succession devolving first upon the heirs-male and female of his own body; which could only be on the deeds executed by his father, after revoking those made by himself. Yet revocation cannot be turned into a deed of settlement. The tenor of it shews that it was only calculated to pave the way for a new settlement by a revocation of the old ones. And he accordingly, in the 1754, executed a formal and solemn settlement upon the Duke of Hamilton and his heirs-male, which was superseded by the subsequent deeds. But even if it were a settlement, it could not avail the appellants, as it expressly reserves to the Duke power to make new settlements, which power was duly exercised in virtue of this reserved faculty.

5. The words "nearest heirs whatsoever," are technical words well known in law, and which have received a fixed and determined signification, denoting the heir of line, or heir general; and, though in some cases *ex præsumpta voluntate*, arising from the face of the deeds themselves, "heirs "whatsoever" may receive a different construction; yet it is clear that in a settlement of heritable succession, they can only be construed to mean the heir of line. And no parole proof can be received to impress a different construction on the deed than that which it legally bears. The deed itself is not ambiguous. It is clear and intelligible. Nor are the words heirs whatsoever ambiguous terms. They have a known legal signification; and it is totally incompetent, and would be of dangerous consequences, to allow such to be affected by the testimony of witnesses.

Several of the above points also occurred in the question between the Earl of Selkirk and Mr. Douglas, and the same arguments used. A separate plea was further insisted in by the

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DOUGLAS, &c. exercised, was so completely exhausted as to deprive him of the power of executing any subsequent deeds to his prejudice, such as were the deeds 11th March and 28th October 1699. It was answered, that the deed 9th March 1699 was a mere nomination of heirs, granted without any onerous cause, and was in its nature testamentary, and so revokable and alterable at pleasure. The judgment pronounced by the Court of Session

Dec. 9, 1762. was: "Find, that neither the clause of return or substitution, " nor the prohibitory clause in the contract of marriage 1630, " disabled Marquis *James* from gratuitously altering the " order of succession appointed by the said contract: And " find that the Duke of Hamilton's claim, founded on the " said clause of return and prohibitory clause, is cut off by " the negative prescription, and also by the positive prescrip- " tion, upon the title of the charter and infestment, anno " 1698, and possession following thereon: Find the deed of " nomination of 11th March 1699, ratified by the subsequent " deed, dated 28th October 1699, is the nomination referred " to in the charter anno 1707; and that the Earl of Selkirk's " claim, founded on the deed executed by the Marquis on 9th " March 1699, and the deed 16th June following relative " thereto, is lost by the negative prescription; Repel the " objection to the sasine anno 1707; and find that the char- " ter and sasine 1707, and possession of the late Duke fol- " lowing thereon, entitle Archibald Douglas to the benefit " of the positive prescription against the conditions and re- " strictions contained in the contract of marriage 1630, and " the deed dated the 9th May 1699. Find that the deed of " revocation 1744 was no proper or legal settlement of the " lands and estate belonging to the late Duke of Douglas. " Find that from the legal import of the clause '*heirs and* " '*assigns whatsoever*', in the late Duke of Douglas, his con- " tract of marriage dated in the year 1759, Archibald Dou- " glas, as heir of line, is called to succeed to the Duke in " his whole estate, including the baronies of Bothwell and " Wandell: And find, that the parole evidence offered by " the Duke of Hamilton and Earl of Selkirk, to the effect " of giving a different meaning to the said clause, is not " competent: And also find that it is not competent to the " Duke of Hamilton or Earl of Selkirk to object deathbed

" to the late Duke's disposition of 11th March 1761, as they  
 " are not called to the succession by the last feudal investi-  
 " ture 1707, nor by the contract of marriage 1759; there-  
 " fore repel the reasons of reduction."

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The Duke of Hamilton put in a reclaiming petition, but his Grace having died before the cause was advised, the guardians of the Duke allowed the matter in the meantime to drop.

The Earl of Selkirk also reclaimed; but, upon advising his petition and answers, the Court adhered, in so far as respected him, as follows:—“Find that the deed of nomination of the 11th March 1699, ratified by subsequent deed, dated the 28th September 1699, is the nomination referred in the charter 1707; and that the Earl of Selkirk's claim, founded on the deed executed by the Marquis on the 9th March 1699, and the deed of the 15th June following relative thereto, is lost by the negative prescription: Found that the charter and sasine anno 1707, and possession of the late Duke following thereon, entitles Archibald Douglas to the benefit of the positive prescription against the conditions and restrictions contained in the deed dated the 9th of March 1699: Found that, from the legal import of the clause, ‘heirs and assignees whatsoever,’ in the late Duke of Douglas, his contract of marriage dated in the year 1759, Archibald Douglas, as heir of line, is called to succeed to the said Duke in that part of his estate claimed by the Earl of Selkirk; and that the parole evidence offered by the Earl of Selkirk, to the effect of giving a different meaning to the said clause, is not competent: And also found that it is not competent to the Earl of Selkirk to object deathbed to the late Duke his disposition of the 11th of July 1761, as he is not called to the succession by the last feudal investiture anno 1707, nor by the contract of marriage anno 1759; therefore the Lords adhered to their former interlocutor, in so far as concerned the Earl of Selkirk, and refused the desire of his petition.”

The Earl of Selkirk, after acquiescing in these judgments for five years, entered his appeal before the House of Lords, in November 1774; and the cause having come on for hearing of this date, upon its being represented that a petition was presented by two of the guardians of the Duke of Hamilton, then a minor; setting forth: “That they had discovered from the printed cases in a cause appointed to be heard before your Lordships, wherein the Earl of Selkirk is appellant, and Archibald Douglas, Esq. and others, are re-

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spondents, that the interest of the Duke of Hamilton, their pupil, may, without having an opportunity of being heard, be materially affected by the judgment in such cause; and that they were resolved to prosecute and follow forth the Duke's claim to the Duke of Douglas' succession, which had been only delayed, on account of the nonage and absence of their ward, and therefore praying for such order as may prevent the Duke's claim from being injured." Whereupon the House of Lords ordered the petitioner's counsel to be heard at the bar, along with counsel of the Earl of Selkirk, if they thought fit. The petitioner's counsel were accordingly heard. Whereupon, as the petitioners contended that they were ready to take out brieves and to proceed with all diligence to assert their claim, the Lords ordered the consideration of this appeal to be adjourned *sine die*.

That the decision of the question in Scotland might not be delayed, an action of reduction was raised at the suit of the respondent, against the appellant, the Duke of Hamilton and his guardians, of all right or claim his Grace might have to the estates in question, and containing a conclusion declaratory of the respondent's right thereto, which was served against him upon the 18th April 1776. To this the Earl of Selkirk was cited as a party.

The Duke of Hamilton, on his part, took out brieves to be served heir of provision to the Duke of Douglas, and upon 15th May 1776, executed three different summons of reduction and declarator, one as to the estate of Angus, another as to Dudhope, and the third as to Bothwell and Wandell; in which the Earl of Selkirk and the respondent were called as defenders.

The Court of Session having conjoined all these processes, Dec. 19, 1776. and again considered the whole cause, "Find that Archibald, late Duke of Douglas, was unlimited fair of his whole estate in question, including the baronies of Bothwell and Wandell. That under the clause of substitution, to his 'heirs and assignees whatsoever,' in his contract of marriage, executed in the year 1759, the said Archibald Douglas, now of Douglas, as heir of line, was called to succeed to the said Duke in his whole estate, including the baronies of Bothwell and Wandell as aforesaid. That the whole parole evidence offered by the Duke of Hamilton, to the effect of giving a different meaning to the said clause in the contract of marriage, is neither competent, nor the co-descendence of facts relevant, and therefore refuse to allow any such proof; repel the whole other defences plead-

"ed by the Duke of Hamilton against the said Archibald  
 "Douglas' declarator ; and in respect the said Archibald  
 "Douglas is already found to have a preferable right to the  
 "Earl of Selkirk to those estates, by final judgment in the  
 "Court in the former process which depended betwixt these  
 "parties, find it unnecessary to give any judgment here."\* 1779.

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The appellant again applied to the Court of Session, by reclaiming petition, in which he confined himself entirely to the argument upon the deed of revocation, and praying the Court, "to find that by the deed 1744, and contract of marriage 1759, heirs-male whatsoever were called to the succession, before 'heirs and assignees whatsoever,' and that therefore the petitioner had a good title to reduce the deed 1761, in favour of Mr. Douglas, executed by the Duke on deathbed." But, on advising, the Court adhered. Mar. 5, 1777.

The Duke of Hamilton then took an appeal to the House of Lords.

In the meantime counsel were again heard in Lord Selkirk's appeal against the interlocutors of 9th December 1762, and 19th July 1769.

In this appeal, it was *pledged for the Earl of Selkirk*, 1st, As against the Duke of Hamilton's claim, that he was entitled to be preferred, because by the deed, 9th March 1699, James, Marquis of Douglas, had full power to substitute heirs-male to the heirs-male of his own body, under such conditions as he thought proper, which is proved by the marriage contracts 1670 and 1692, and by the power and faculty reserved in the disposition 1697, and charter 1698. Nor was he restrained from so doing by the clause of return in the contract of 1630, nor the prohibitory clause therein, and possession having followed on charter and sasine for more than 40 years, in consequence of the deed of nomination 1699; all challenge was cut off. Nor is the Duke of Hamilton entitled to plead the deed of revocation 1744, as a settlement by the late Duke of Douglas, in favour of the heirs of the "ancient rights and investitures," because it was not a settlement conveying the lands, nor even one in-

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\* Note.—"At advising this cause, the Lords were unanimous; and rested their opinion chiefly upon the positive prescription creating the late Duke unlimited fief of his whole paternal estates, (for as to his own purchases there was no question,) and on the substitution of the contract of marriage 1759, calling his heirs and assignees whatsoever to the succession. As to the first, the decision in the case of Mackerston, and other like decisions, were highly commended and approved of. And as to the second, the decision in the case of Waygateshaw, allowing parole evidence to explain the words of a settlement, in themselves sufficiently clear, was greatly condemned." Brown's Supp. "Tait," p. 467.

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ferring an obligation to convey, so as to entitle to enforce implement thereof. 2d, In regard to Archibald Douglas' claim, he maintained that the only question between him and the appellant was, which of the deeds of appointment made by Marquis James, pursuant to the powers reserved by him in his settlement of 14th September 1697, was the standing and effectual nomination of heirs of the Marquis. He insisted that the proper deed of nomination of heirs which regulated the succession, was the deed of 9th March 1699, by virtue of which, Lord Basil Hamilton, the appellant's father, (in whose right the appellant was) was called, failing heirs-male of his own body, and he was therefore entitled to succeed upon that deed, together with the deed of 15th June following (1699). It was, besides, a delivered and completed deed before the subsequent deed of nomination, 28th October 1699 was executed. That any reserved faculty which the Marquis had, was completely exhausted by this deed, so as to debar him from executing the subsequent deeds of nomination. That the deed of 11th March 1699, therefore, which introduced, for the first time, heirs-female, together with the deed of nomination of 28th October following, were not the deeds which regulated the succession ; and as the deed of 9th March is referred to in the charter of 1707, and as the latter investiture refers to the tailzie of 9th March 1699, no subsequent deed could sweep it away. Besides, the whole scope and tenor of the subsequent deeds, 1699, which introduced heirs-female, go to shew that the estates were limited to heirs-male ; and as these latter deeds, which introduced the female branch, were only impetrated from the Duke by fraud and imposition, the same were null and void.

*Pleaded for Mr. Douglas.*—That the deed of March 1699, which preferred Lord Forfar, and certain younger sons of the family of Hamilton, to his own two daughters and lineal descendants, was obtained by undue means and by fraud. That, besides, even if a fair deed, it was effectually revoked by the deeds of 11th March and 23d October 1699, and as the Marquis was an unlimited fiar, he had full power to execute such deeds, and consequently power to revoke it. But even if this deed of 9th March was such as could not be revoked by the Marquis, yet his son, the late Duke of Douglas, was not thereby debarred from altering the order of succession, as the Marquis had reserved no power to lay his son, the fiar, under any limitation. · The deed of 11th March is now confirmed by the negative prescription. Besides, by the terms used in that deed, "heirs whatsoever," Lord Basil Hamilton, in whose right the Earl of Selkirk claims, was not meant. By the term "his own nearest

heirs and assignees," it was evident that his heirs general were called, and were entitled to take the succession, failing the two preceding branches, because the Duke had power so to order his succession. Further, as the deed 9th March was a mere renunciation of heirs, executed in virtue of a reserved faculty, yet as this is a mere will of a testamentary nature, it was revoked at any time, and this whether the deed was delivered or not.

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That as the deed of entail 1761 was executed in virtue of a reserved faculty to nominate heirs, the plea of deathbed could not apply to that deed, as having been executed on deathbed. The Duke had reserved power in his contract of marriage to nominate and appoint heirs at any time, which power could be legitimately exercised on deathbed. Besides, such a plea was only competent to an heir *alioqui successurus*, which the appellant the Earl of Selkirk is not.

After hearing counsel, the House of Lords pronounced Affirmance of this judgment in the Earl of Selkirk's appeal,

Earl of Sel-kirk's Appeal,

Ordered and adjudged that the interlocutors complained Mar. 8, 1777.  
of be affirmed.

The Duke of Hamilton's appeal having been then heard : against the above two interlocutors of 19th Dec. 1776 and 5th March 1777 it was

*Pleaded for the Appellant, the Duke of Hamilton.*—As to his right under the feudal investitures of the estates; 1. It is proved, that the estate, as well as the honours of the Douglas family, have from the times of the remotest antiquity, down to the death of the late Duke of Douglas in the year 1761, been settled upon, and uniformly enjoyed by the heirs male of the family, in preference to females or heirs of line. And for the purpose of more effectually securing the succession to the heirs male, the deeds executed by William, the first Marquis of Douglas, in the years 1630 and 1655 contained a clause of return in favour of these heirs, and a *prohibitory clause*, which were framed with an anxious attention for preventing the separation of the estate from the honours. The first attempt towards a deviation from the line of male succession, was that which appears from the deeds which James, Marquis of Douglas, was prevailed upon to execute in the year 1699; but the attempt made by these deeds to call to the succession either the heirs female of this Marquis of Douglas, or his distant male relations, in preference to the heirs male of the family, was null and ineffectual.

2. The four contradictory and inconsistent deeds of nomi-

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nation of heirs executed by James Marquis of Douglas upon the 9th and 11th of March, 15th of June, and 28th of October 1699, the first and third of which are in favour of the ancestors of the respondent, the Earl of Selkirk, while the second and fourth, under which the respondent Mr. Douglas claims, are in favour of the heirs female or heirs general of the Marquis, were all and each of them, from the contents of these deeds themselves, and from the circumstances attending them, so highly objectionable, and contain such intrinsic marks of deception or material error, that the only effect due to them is that of their reciprocally counteracting, destroying, and annulling each other. When these contradictory and exceptionable deeds of the year 1699 are set aside, and when matters are thus brought to the same situation as if the Marquis had omitted altogether to make use of the power reserved to him, of substituting heirs to the heirs male of his son's body, then the destination of succession, even according to the deeds executed by this Marquis of Douglas, and particularly according to the terms of the investiture in the year 1698, stood thus: " 1st. To the " Duke of Douglas, and the heirs male of his body ;—next, " to the other heirs male of the Marquis' body ; next, to " the Marquis' heirs male whatsoever, (which in the present case is the appellant the Duke of Hamilton) ; and lastly, to " the Marquis' heirs and assignees whatsoever."

3. Although the tutors who acted for the Duke of Douglas during his infancy in the year 1707, obtained a new charter from the crown, for the declared purpose of changing the feudal tenure of his estate, in which, however, they introduced a destination of succession in a very obscure and indirect manner, alluding to an undescribed nomination following upon the reserved power in the charter 1698 ; yet it is impossible that it could be of any avail to the respondents, because the contradictory deeds and nominations of the Marquis of Douglas in the year 1699 having been from the beginning null and inefficient, it was not in the power of these tutors, by an act of theirs, to give validity and effect to deeds which, independent of their acts, were in themselves invalid and unavailable.

4. The mode in which this was attempted to be done by those tutors, by avoiding, in the charter 1707, any mention of the date or the contents of the nomination to which they intended it should relate, or any mention of the heirs meant to be introduced into the line of succession, was such as must have deprived it of the proposed effect, supposing them to have meant, as is maintained on the part of the respondent

Mr. Douglas, to give effect to the Marquis of Douglas' nomination of 28th October 1699, and thereby to establish Lady Jane Douglas' right to the succession in preference to that of the heirs male of the family.

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5. Because the procuratory of resignation executed in the year 1707, by the Duke's tutors, for and in name of their pupil, and the charter which of course followed upon it, if interpreted to contain a destination of succession, by which Lady Jane Douglas, and her issue, were called to the succession, in preference to the collateral heirs male, was in so far as relates to that declaration, and in so far as the Duke of Douglas might have been supposed to acquiesce under it, totally revoked and destroyed by the deed executed by the Duke of Douglas in October 1744, and by the revocations executed by him in the month of June 1752. The object of which deeds of the years 1744 and 1752 being to defeat Lady Jane's expectations of succession to the Douglas estate, and at the same time to send it to the heirs of the ancient investitures thereof.

6. For all these reasons, the charter 1707, under which the Duke of Douglas continued to possess his estate, must necessarily be understood and interpreted to be a continuation of the destination of succession that was contained in the charter 1698; which, as has been already explained, settled and secured the estate to the heirs male of the family immediately after the heirs male of the body of James Marquis of Douglas; and it being thus established that the charter and inffeftment 1707, which was the latest modern investiture, as well as all the ancient investitures of the Douglas estate, provided and secured the right of succession to the heirs male; and it being admitted on all hands, that the latest feudal investitures of the estate of Bothwell and Wandell, to which the Duke of Douglas succeeded in the year 1716, were indisputably in favour of the *heirs male*, it necessarily follows that the appellant the Duke of Hamilton, as heir male of the family, must be entitled to all those estates; either in case the Duke of Douglas died without making any settlement at all in relation to these estates; or in case the settlements executed by him, and left in force after his death, were in favour of the heirs of the ancient investiture of the Douglas estate.

7. But further, in regard to the appellant's right under the deeds of the late Duke of Douglas, it is maintained, that the deed executed by the Duke of Douglas in 1744, which contains a revocation of all deeds and settlements made by him preceding that date, in relation to his estate, contains an express declaration of his will and pleasure with regard to the heirs he chose to succeed him in his estate;

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as the Duke in that deed has expressly declared that he executed it "to the end that on failure of himself and the heirs male and heirs female of his own body, his lands and estate, and heritable offices and jurisdictions, might descend to and continue with the heirs of the ancient rights and investitures of the same."

8. And even supposing the deed 1744 were informal, incomplete, or ineffectual by itself, all objections are removed by the contract of marriage 1579, whereby the Duke became obliged to provide and secure his estates on default of his own issue, to such heirs as he had named or should name and appoint in the settlements of his estate made or to be made by him. The deed 1744 was found in the Duke's repositories, along with the contract of marriage, uncancelled; it is the only legal subsisting settlement executed by him; it is a nomination and appointment of heirs to succeed to his estate; it is perfectly consonant to the contract of marriage; the conclusion is evident and necessary; it is the nomination, appointment, and settlement referred to in the contract; it is part of the contract; and of course the Duke of Hamilton, the heir of the ancient investitures, is entitled to take under the remainder or substitution in the contract, preferably to the right which the respondent Mr. Douglas claims under the last institution to heirs and assignees whatsoever. This deed, even if held as a mere revocation, could not deprive him of the estates of Bothwell and Wandell, which always stood destined to heirs male, long before the Duke succeeded, and as the revocation only referred to all the settlements the Duke of Douglas had made in favour of heirs female, it left these estates to go to the heirs male.

9. If the right is with the appellant, the Duke of Hamilton, on the supposition that the Duke of Douglas had executed no deed of settlement of his estate posterior to the contract of marriage 1759, the deed of 11th July 1761, (the only one he did execute, and whereby he conveyed his estate, in default of his own issue, to the heirs general of his father's body), can make no difference, but must be held *pro non scripto*, because it was executed on deathbed, in circumstances where, by the established law of Scotland, a person can do nothing to injure the right of the legal successor to his estate. And it is no answer to this to say, that though the deed was executed on deathbed, yet as it was only the heir who had the immediate right to succeed, who could void the deed on that ground, that the objection did not apply, because the Duke of Hamilton had the best right to succeed as heir male under the investitures 1695 and 1707.

One general objection has been made by the respondent Mr. Douglas, to the appellant's claim under the deed 1744, that as the Duke of Douglas had declared his predilection for the respondent, his heir of line, not only by the settlement which he executed within a few days of his death, in the month of July 1761 ; but also by his cancelling and destroying in the year 1760 the regular settlements which he had executed in favour of the Duke of Hamilton's family in the years 1754 and 1757 ; therefore the claim now made by the appellant is not entitled to any degree of favourable interpretation, and that it is merely owing to accident that the appellant has any claim at all in consequence of the deed 1744, for it is evident from the circumstances of the case, that the Duke of Douglas, at the same time that he cancelled the settlements 1754 and 1757, would have cancelled and revoked this deed 1744, if he had considered it in the light of a settlement upon the Duke of Hamilton's family. But the answer to this is, supposing it were true that the deed 1744 had escaped the fate of the settlements 1754 and 1757, merely from accident, or from ignorance or misapprehension of its nature and effect on the part of those who were principally instrumental in the cancellation of those settlements, still these extraneous circumstances could not in any respect vary the case, or alter the interpretation of the deed under which the appellant claims : for every court of justice will reckon itself bound to judge of a man's intentions by the deeds executed by him, and left subsisting uncancelled and unrevoked at the time of his death,—such deeds must be considered as containing the intentions of the deceased, not only at the time when the deed in question was executed, but also those in which he persisted to the moment of his death. But if the argument founded on accidental circumstances were entitled to any weight in the decision of the present question, the appellant might be entitled to claim the benefit of that argument fully as much as the respondent ; for it must appear to be a remarkable circumstance in this cause, that the only ground upon which Mr. Douglas can have any pretence for disputing with the heir male of the family the right to all the ancient estate of Douglas, is the accidental circumstance of the words "heirs and assignees" having been thrown into a marriage contract as words of style at the close of all the substitutions in that contract ; which words were not only so inserted without any directions from the Duke of Douglas himself, but it

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is clear to demonstration, that the Duke could not, at the time, have intended to insert any words that could directly or indirectly call to the succession the respondent Mr. Douglas; for it is acknowledged that in the year 1759, when this marriage contract was executed, the settlements which the Duke had made in the years 1754 and 1757 were subsisting settlements; and in the latest of these there is a clause in these words: "I Archibald Duke of Douglas, do by these presents debar and exclude the children, one or more, and issue of my deceased sister, Lady Jane Douglas, from all right of succession to my estates, means and effects whatsoever." It was not till within ten days of the Duke of Douglas' death, when worn out with disease and infirmity, and unable to resist the never ceasing importunity of those who had then got the ascendancy over his mind, that he executed, for the first time, a deed favourable to the interests of the respondent Mr. Douglas. In these respects, therefore, the appellant, the Duke of Hamilton, is entitled to say that Mr. Douglas' claim for any part of the Douglas estate derived from the words "heirs and assignees," in the contract of marriage, is owing to fortuitous circumstances, in which he has had at least as much good fortune as can be ascribed by him to the appellant on account of the existence of his claim under the deed 1744. The present contest for the ancient estate of Douglas, is the only instance that has occurred in the course of many centuries, of an heir of line disputing the right to that estate with the heir male, excepting one instance only, when King James the Sixth, as heir of line of the *Douglas* family, contested that point with Sir William Douglas, afterwards Earl of Angus, the heir male, upon which occasion judgment was given for the heir male against his Majesty, then present in Court. It has also been shown that, in the course of 700 years, from the year 1061 to the death of the late Duke of Douglas in the year 1761, there has been no instance of either the estates or honours of the Douglas family being enjoyed by a female or heir of line, though repeated instances have occurred of their being excluded from both the estates and honours by collateral heirs male. It cannot therefore be deemed an unreasonable or unfavourable pretension on the part of the appellant, that while the respondent Mr. Douglas is allowed to enjoy, without dispute, all the estates acquired by the late Duke of Douglas, to the amount of about £6000 of year-

ly rent, the appellant, now Marquis of Douglas and Earl of Angus, inheritor of all the honours of the *Douglas family*, should for himself, and the succeeding Marquises of Douglas and Earls of Angus, assert their rights and pretensions to the estate of *Douglas*, the ancient inheritance of their ancestors.

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*Pledged for the respondent Mr. Douglas.—*

1. The deed 1744 was never intended for, nor considered by the Duke of Douglas as a settlement of his estate, nor was it in the form of a settlement. The evident purpose and effect of it was, to recal the deeds which he had executed, in order to pave the way for new settlements; in the meantime leaving the estate, in the event of his death, to continue descendible according to the ancient rights and investitures. This is just the reverse of a settlement; for the plain sense and meaning of the transaction is, that the settlements were taken out of the way, in order that they might not bar the succession by the investitures, reserving to the Duke to make new ones if he felt inclined. No settlement was ever made in the form of a preamble to another deed, and it would lead to great injustice and arbitrary decision, were judges to go into the loose doctrine of raising up every supposed *indication of wills* which can be found in any deed of whatever nature, as a settlement fit for carrying succession. The law of Scotland is most abhorrent to every such principle; for, in the case of personal estate, it does not acknowledge nuncupative wills, but requires a formal writing; and with regard to real or heritable estate, it is a fixed rule, that the will is not sufficient, though expressed in writing, but that the transmission can only be *per verba de præsenti*, by actual conveyance, or in such obligatory form as will operate a conveyance by legal process. 2. If the appellant had a *will* in his favour, it would not be sufficient; but in fact he has none; for he begins by converting that into a *will* which is a deed of another kind. His argument is neither founded in law nor in sound criticism; for it disjoins the recital from the body of the deed, and, taking the recital as standing by itself, it transmutes into a will. This is dealing unfairly with the deed; for the recital is necessarily connected with what follows: "To the end, &c. he revokes." This is a mere declaration of what would be the consequence of his settlements being revoked; *i. e.* that the heirs of his ancient investitures might be let in. He revokes, in order to let them in. Taking it in this sense, the means are well

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suited to the end ; but taking it as a settlement, and especially as a settlement upon a stranger, the conclusion does not follow from the premises. If I revoke my own private settlements, to the end that my succession may continue with the heirs of my family investitures, I speak good sense; but if I revoke them, to the end that my succession may continue with a stranger, not yet called to the succession, this is unintelligible. I must make a new settlement in his favour, before he can succeed, and then the succession will not *continue to descend, as by the investitures*, but will be entirely new-modelled. The Duke of Douglas reserved to himself a power of doing so, but he did not make a new settlement in that very deed ; for the deed 1744 was nothing more nor less than a revocation. 3. But even if the revocation 1744 could be turned into a settlement, it would not be in favour of the appellant, but, failing heirs of the Duke's body, would be in favour of the respondent, as to all the estates except Bothwell and Wandell ; for it is in favour of the heir called by the former rights and investitures ; and it is now fixed by your Lordships' decree, that the respondent is the heir of destination in the charter and infestment 1707 as well as by the preceding deeds of the Marquis of Douglas. The last investitures cannot be got over—ancient rights and investitures stand in opposition to the recent settlements executed by the Duke, and there can be no propriety in going back to the contract of marriage 1630, over the heads of all the intermediate rights and investitures, in order to get at the male succession ; for if one century is to be overleapt, so may another, and then we get into the female succession again. 4. The settlement 1754, when the Duke thought proper to prefer collateral heirs male to his succession, introduces itself with a studied preamble in favour of the plan then formed : and although it exceeds the truth in other particulars, in framing excuses for disinheriting his heirs female, and preferring the Duke of Hamilton, founded chiefly upon the clause of return in the contract 1630, and upon the pretended rights of heirs male by the " charters, investitures, and infestments of the estate of Angus," it is extremely remarkable that not a word is said of any previous settlement having been made upon them by the Duke himself. Mr. Archibald Stewart was the writer of the deed 1754, and it could not be unknown, either to him or the Duke, that there was a deed 1744, which Mr. Stewart himself had written, and of which the Duke had carefully

preserved duplicates. Neither could they be mistaken as to its import; they knew whether it was a revocation, or a settlement, and from their conduct it is perfectly clear, that they knew it to be no settlement. Mr. Chalmer, the successor of Mr. Stewart, knew the same thing when he corresponded with the Duke upon the subject of his settlements, and the Duke must have continued in the same belief, when he afterwards revoked and cancelled the deeds 1754 and 1757, in order to restore the succession to its former channel, leaving entire the deed 1744, because it was only a revocation

5. The reason why the appellant is so anxious to convert this revocation into a deed of settlement, is, that he may found upon it, as adopted in the penult substitution of the contract 1759, under the description of a settlement already made, naming heirs to succeed, failing those of his own body; but it would be shutting one's eyes to the light of the sun, not to see that the settlements which the Duke had then in view, as already made, were those actually subsisting upon the family of Hamilton, viz., the deeds 1754 and 1757, which being afterwards taken out of the way by the revocation 1761, there was an end to this part of the destination in the contract of marriage, as no more settlements subsisted, by which the Duke had already named heirs. But it was still in his power to execute new deeds, and unless he did so, the succession, of course, devolved upon the last substitution of "heirs and assignees whatsoever."

6. Without making the deed 1744 a part of the substitution 1759, it is obvious that the appellant has not a foot to stand upon; for if these two deeds are independent of each other, suppose them both to be settlements, the last must be the rule, as a posterior settlement always supersedes a prior one. But, even if he were to prevail in cementing them together, he would not thereby carry the succession; for he must take them as they are, with their qualities and conditions, and he must submit to the Duke's *alteration* upon *deathbed*, in consequence of his *reserved power*. This is clear as to the estates of Angus and Dudhope; for the Duke of Hamilton being called in as a stranger heir to these estates, under a condition of permitting the grantee to make new settlements at any time, he cannot both approbate and reprobate; he must submit to the quality contained in the deed under which he claims. 7. This holds the more especially, when it is considered, that the writing, upon which alone the claim did arise, continued in the Duke's

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own hands, or which is the same thing, in the custody of him and his men of business, subject to his power of making away with it at any period, down to the last moment of his life; and being a latent deed in his own power, defeasible by the simple act of cancellation, no right of heirship could arise from it in favour of any person, unless he allowed it to become effectual by his death without alteration. An heir in a man's pocket is no heir at all—he has no hope of succession—he is not presumptive heir—he has only the chance of afterwards becoming an heir in case the grantor persists in his intentions; but if he does not, the case is the same as if the deed had never existed. In short, the person called by such a deed, has no title or character in him which can be protected by the law of deathbed. 8. As to Bothwell and Wandell, it is true that the Duke of Hamilton was *aliunde* called to the succession by the investitures of that date; but this circumstance will not avail him in the argument, because the destination contained in these investitures was alterable, and was altered by the contract of marriage 1759, unless the Duke of Hamilton can prove himself to be called under the penult substitution in that contract; for if the penult substitution is laid aside, the *last* must necessarily be the rule, and the heir at law must prevail. The appellant is therefore reduced to the necessity of claiming under the contract of marriage, as referring to the deed 1744, and if the deed 1744 cannot be supported against the Duke's power of defeating it at any period of his life, the question is at an end. The Duke did not, in the contract of marriage, expressly name the Duke of Hamilton, but only referred to settlements made; and supposing this reference could be held as applicable to the deed 1744, yet as that deed certainly remained under the Duke's power to be destroyed at any time, so, when he altered it by the deathbed deed, there was an end altogether to this pretended settlement, as if it never existed; and, consequently, there was an end to the penult clause in the contract of marriage, so far as regards any reference to prior settlements.

April 6, 1778. The House of Lords pronounced this order:—“ Counsel “ having been heard, in which the Duke of Hamilton and “ his Guardians are appellants, and Dunbar, Earl of Selkirk, “ and Archibald Douglas of Douglas, Esq. are respondents; “ the counsel for the appellant having waived all objections “ to the decree appealed from, except what arose from the “ deed 16th October 1744, and having been heard last Fri-

" day upon the nature and effect of the said deed ; and the  
 " cause having been adjourned for further hearing to this  
 " day, the counsel for the appellant alleged, that last Satur-  
 " day, upon inspecting the said original deed, they discov-  
 " ered that the words in the marginal note were "and fe-  
 " male," which they apprehended would be a circumstance  
 " very important in their favour. The counsel for the re-  
 " spondent Mr. Douglas alleged that it was a material cir-  
 " cumstance on their side of the question ; and that it had  
 " been taken notice of in the pleadings in the cause deter-  
 " mined 1762; but it was agreed on both sides, that no  
 " notice had been taken of these circumstances on either  
 " side, in the argument in this cause. Their Lordships,  
 " therefore, without exercising any judgment as to the ma-  
 " teriality of them, think fit to remit the cause to the Court  
 " of Session, and to direct them to consider, whether the  
 " marginal note, as it appears on the face of the said original  
 " deed, makes any difference as to the question decided by  
 " them in the cause, upon the nature and effect of the said  
 " deed. It was ordered and adjudged that the cause be  
 " remitted back to the Court of Session in Scotland, to con-  
 " sider whether the marginal note, as it appears upon the  
 " face of the said original deed of 16th October 1744, makes  
 " any difference as to the question decided by them, in this  
 " cause, upon the nature and effect of the said deed. And  
 " it is further ordered that the further hearing of this ap-  
 " peal be adjourned *sine die*, with liberty for either party to  
 " apply to the House, when the said Court of Session shall  
 " have given their opinion upon this reference."

In consequence of this order, the cause was again heard in the Court of Session, upon the points remitted.

Before the Court below, the Duke contended, 1st, That the occasion upon which the deed 1744 was executed, shewed that it must have been intended as a settlement, and a settlement adverse to the succession of the heirs general. It was made upon occasion of the Duke's being disgusted with his sister Lady Jane's conduct, and to prejudice her, as was repeatedly admitted by the respondent, Mr. Douglas, himself, in the earlier legal proceedings. 2d, That the appellant, the Duke of Hamilton, as heir-male of the Douglas family, is the person entitled to claim under the ancient investitures of the estates. 3d, That the deed 1744, taken either by itself, or in connection with the marriage articles 1759, is, by law, a valid and effectual set-

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tlement. The deed 1744 had all the required solemnities. It contained the will of the granter in clear and intelligible language. And it is no answer to say, that, taken by itself, it is invalid, as wanting the essential clauses necessary to convey heritable estate, because, when taken in connection with the marriage contract in 1759, the two deeds make up a complete conveyance. From the clause in the latter deed, whereby the Duke became bound to secure his estate, failing heirs of his own body, of that or any subsequent marriage, "to such heirs as the said noble Duke *hath*, or *shall name* "and *appoint*, in the settlement of his estate *made* or to be "made by him; and failing thereof, to his own nearest heirs "and assignees whatsoever." By this clause in the deed 1759, it is clear that the deed 1744, although defective in point of form, must be held as referred to in this clause of the contract 1759, and incorporated in it; and, accordingly, the destination of the contract will stand thus:—To the heirs-male of the Duke's body; remainder to the heirs-female of that marriage; remainder to the heirs named in the deed 1744; i. e. the heirs of the ancient rights and investitures, or heirs-male; remainder to the Duke's heirs whatsoever; and, in this view, every objection to the form of the deed 1744 is removed. 4th, That the deed 1744 was never legally altered. That it was confirmed by that in 1759, and these two prior deeds, if legally binding, could not be affected or altered by the deathbed deed of 1761. That the deed 1744 was meant by the Duke of Douglas to be a settlement of his whole estates, and the deed itself bore intrinsic evidence of this intention. It stood originally on failure of heirs-male, but afterwards was corrected by a marginal addition, so as to make it read, on failure of my heirs-male "and female" of my own body, my lands and estate may descend to, &c. This correction shewed that he knew they would be excluded, unless the marginal correction was made.

Dec. 19, 1778. The Court of Session, upon considering the memorials pronounced this interlocutor, by way of report to the House of Lords; upon the reference of your Lordships; twelve of the judges being of the opinion contained in it, and two the contrary, "The Lords having resumed consideration of "the remit and order of the Lords Spiritual and Temporal in "Parliament assembled, of the 14th April 1778, &c., and "having in pursuance thereof, heard parties procurators in "their presence on the subject matter of the said remit and

"order; and having advised memorials given in for both parties, they find the deed of revocation 1744 is not a settlement of succession, and that the appellant Douglas, Duke of Hamilton, has no claim under it: And they further find, that the marginal note, as it appears upon the face of said original deed of the 16th October 1744, and the words 'after my death' in the clause of registration, make no difference as to the question now and formerly decided by them upon the nature and effect of said deed, and determine and declare accordingly."

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Upon resuming consideration of this case, and a petition Jan. 25, 1779. moving the same in the House of Lords, setting forth that in terms of the above remit, the Court of Session had accordingly heard parties very fully upon the nature and effect of the deed of 16th October 1744; and upon the subject matter of the said remit; and had duly considered memorials for both parties thereon, and had pronounced this interlocutor: "Find that the deed of revocation 1744 is not a settlement of succession, and that the appellant Douglas, Duke of Hamilton, has no claim under it; and they further find that the marginal note, as it appears upon the face of the said original deed of the 16th October 1744, and the words 'after my death' in the clause of registration, make no difference as to the question now and formerly decided by them, upon the nature and effect of said deed." The respondent prayed their Lordships "To appoint this cause to be further heard, which they do accordingly upon Wednesday the 17th day of March next."

On 29th March, their Lordships

Mar. 27, 1779.

Ordered and adjudged that the appeal be dismissed, and the said interlocutors therein complained of be affirmed.

For EARL OF SELKIRK, *Andw. Crosbie, George Hardinge, Sir David Dalrymple, P. Murray, Alex. Wight.*

For DUKE OF HAMILTON, *Al. Wedderburn, J. Dunning, Gilb. Elliot, Alex. Lockhart, Sir John Stewart, J. Campbell, jun., Walter Stewart, Wm. Johnstone, Nairn, Sir Adam Ferguson.*

For MR. DOUGLAS, *E. Thurlow, Henry Dundas, Alex. Murray, Burnet, Montgomery, Garden, M'Queen, Rae, Ilay Campbell, R. Sinclair, John Pringle.*

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v.  
**MAXWELL, &c.**

JOHN COLTART of Areeming, Esq. - *Appellant;*  
 WINIFRED MAXWELL of Nithsdale, and WIL-  
 LIAM HAGGERSTON MAXWELL CONSTABLE,  
 Esq. her Husband; JOHN MAXWELL of Ter- } *Respondents.*  
 rachty, Esq. and Others, *et e contra,*

House of Lords, 29th January 1779.

**SUPERIOR AND VASSAL—HOLDING PRESCRIPTION.**—Vassals holding church lands of the Abbot as superior, before the Reformation, had obtained a charter after that event from the Crown, providing that the lands were to be held of the King as superior thereof: Held that this charter, followed by prescription, did not entitle these lands to be holden always of the Crown, or prevent a grant by the Crown of such superiority to a third party *in commendam*; the Crown being entitled so to convey the superiority.

After the Reformation, the act 1587, called the Annexation Act, was passed, whereby lands which belonged to any abbey, convent, cloister, &c. were annexed to the Crown, to remain with it in all time coming, and all those who held their lands of the church were thenceforth to hold of the King as immediate superior. After this event, it was the practice for the Crown to give grants of these church patrimonies, thus devolving on it, to laymen *in commendam*, who were called commendatories.

1544. The lands called Forty-nine two shilling land of *Kirkpatrick Durham*, in the Stewartry of Kirkcudbright, belonged to and made part of the patrimony of New Abbey. They were sold by the Abbot, some years before the Reformation, to Robert Maxwell, to be held under the Abbot and his successors, as superior thereof. After the Reformation, and when these estates devolved on the Crown, the abbacy was granted by the Crown *in commendam* to Mr. Robert Spottiswoode, afterwards Sir Robert Spottiswoode, son of the

1614. Archbishop of St. Andrews, who was afterwards one of the Lords of Session, under the title of Lord New Abbey. The property of the above lands of Kirkpatrick Durham was in the famiiy of Maxwell, and it was maintained that the superiority was in Sir Robert Spottiswoode.

1621. Lord Maxwell having been tried for murder, found guilty, and executed, his estates were forfeited to the Crown in 1609, but, by charter of *novodamus*, these were restored by King James VI. to his brother, Robert Maxwell, in 1621; and in the grant they were made to hold the lands of and

under the King, just as the Maxwells formerly held of the Abbots as superiors thereof, as coming in place of the Abbots, "virtute acti annexationis omnium terrarum temporalium "hujus regni nostri Scotiæ patrimonio nostræ coronæ."

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Of this date, Sir Robert Spottiswoode, upon his own resignation, obtained a grant under the Great Seal from King James VI. of the whole lands, baronies, tythes, feu-duties, *superiorities*, and other patrimonies which had belonged to the Abbey of New Abbey, and *inter alia* "totas et integras "terras et baroniam de *Kirkpatrick-Durham* cum molen- "dino terris molendinariis, multures," &c. And by special clause in the grant, the whole vassals are declared and directed to hold their lands from and under Sir Robert Spottiswoode as their superior, and in regard to which the King promises to obtain an act dissolving the estate from the general annexation act of 1587. This was done accordingly by King Charles I. in 1633. Sir Robert thereafter sold his whole estate to the King, who endowed the bishopric of Edinburgh therewith under episcopacy; and when episcopacy was abolished it again reverted back to the Crown. Whereupon King Charles, by his grant of this date, Sept. 29, 1633.

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reciting that as, in the sale of the said lands by Sir Robert Spottiswoode, the price, £3000, agreed on, was never paid to Sir Robert by him, he therefore gave him the barony of New Abbey: but on this grant or signature charter or infestment never followed, and so was not complete. Upon the Restoration, Alexander Spottiswoode, son of Sir Robert Spottiswoode, obtained a new signature from Charles II., but he having died before completing his titles, and episcopacy being again restored in 1662, the Bishop of Edinburgh got possession, and kept it till 1689, when episcopacy was finally abolished. On this event, the estate of New Abbey again reverted to the Crown. And in 1741 was again conveyed by the Crown's charter to Alexander Spottiswoode,

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who, of this date, disposed the feu-duties and *superiorities* to the appellant, Mr. Coltart, who, upon finding that the Maxwells, the vassals in the lands of Kirkpatrick Durham, still persisted, notwithstanding the above title, to hold the lands as immediate vassals of the Crown, brought the present action of declarator of non-entry and maills and duties. The question was, whether upon the face of the title, as above set forth, the lands of Kirkpatrick Durham, being a part of New Abbey, were held by the respondents (Maxwells) of the Crown or of Sir Robert Spottiswoode and his successors, as superior?

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**Mar. 5, 1777.** that the Court decided, of this date, that the defenders (respondents) were entitled to hold their lands of the Crown:

**Jan. 13, 1778.** And, on reclaiming petition, the Court pronounced this special interlocutor; "Find that the charter and infestment 1621, founded on by the respondents, was a null grant, as being contrary to the act of annexation; and that the act of dissolution 1633 was not applicable to, nor could support the said charter and infestment. Find, that by virtue of the charter 1624, and act of dissolution 1633, Sir Robert Spottiswoode was entitled to the superiority of all lands formerly held of the Abbacy of New Abbey; and that by the after conveyance by him to the Crown, and the subsequent erection by the Crown of the bishopric of Edinburgh, the superiority of the lands formerly held of the Abbacy of New Abbey, were legally vested in the Bishop of Edinburgh and his successors." Find the act 1690, declaring the superiorities which pertained to the bishops, to belong to the Crown, ought not to be extended to the superiorities of New Abbey, in respect that by the declaration of the parliament 1695, it is declared that the act 1662, restoring bishops, did not prejudice the heirs of the said Sir Robert Spottiswoode; and therefore find, that the petitioner, as in right of the charter 1741, granted to John Spottiswoode, the heir of Sir Robert, has just right and title to the superiorities of the lands libelled; and find, the possession held by the bishops of Edinburgh of the feu-duties payable to them out of the said lands, during the subsistence of episcopacy, and by the factors appointed by the Crown, for uplifting the bishop's rents.

The respondents maintained that they had never acknowledged, nor had they ever been called on to acknowledge, the grantees (Spottiswoode and Coulter) as their superiors; that by the charter in their favour in 1621, the privilege of holding these lands of the Crown was conferred upon them irrevocably, and that the titles and subsequent grants in favour of Spottiswoode was only intended to carry the feu-duties, which the respondents and their ancestors paid to them, and, in confirmation of this, he referred to two charters from the Crown in 1648 and 1741; and, finally, that even if these titles were in any way objectionable, these objections were now barred by the act 1617; and the respondent's right fortified by the positive prescription.

It was not until several interlocutors of the Lord Ordinary and Court, deciding that the respondents held of Spottiswoode as superior, (which are the subject of the cross appeal),

"since the year 1690, when episcopacy was abolished, is sufficient to bar the respondents' plea of prescription, and repel the said defence of prescription accordingly. Finds the lands libelled are in non-entry; but in respect of the ~~MAXWELL, &c.~~ circumstances of this case, and the doubts thence arising touching the superiority of the lands in question, find the petitioners only entitled to the retour duties of the lands preceding the date of this interlocutor; but find him entitled to the full maills and duties from this date, ay and until the respondents be lawfully entered and received by the petitioner as his vassals therein, and decern and declare accordingly."

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The appellant brought an appeal against that part of the interlocutor which finds them entitled only to the maills and duties of the lands in question subsequent to the date of the interlocutor, and not from citation. And the respondents brought a cross appeal against the rest.

*Pleaded for the Appellant.*—By the charter 1624 the superiorities of these lands were conveyed in express words by the Crown on Sir Robert Spottiswoode, who thereafter became the undoubted superior thereof. The act 1633, dissolving these lands from the annexation act of 1587, confirmed this right, and entirely divested the Crown. The same question had been tried by him with his vassal Burnet, when the House of Lords gave effect to it, and the question ought therefore to be held as *res judicata*. This being fixed, and the Court of Session not denying his right, he ought to be restored to the full effect, so as to have right to the maills and duties from the date of citation in the present action.

*Pleaded for the Respondents.*—The respondents are endeavouring to maintain themselves in the state which they and their predecessors have enjoyed for more than 150 years, during which time they were never called on by the appellant's predecessors for an entry, or in an action of maills and duties, and their right is therefore absolutely secured to them by act 1617, conferring an unchallengeable prescriptive title. This right has for its basis, a conveyance of the property of these lands, by the Abbot of New Abbey prior to the Reformation; and a charter subsequent to that event, whereby the Crown, in whom the superiority of these church-lands then vested, conveyed that lands of new, to be held irrevocably of the Crown, by charter 1621, and which was confirmed by two subsequent charters, upon which prescriptive possession has run, whereas all that the appellant ac-

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quired by his rights was a right to the feu-duties merely, and not to the superiority of the lands of Kirkpatrick. The rule that the vassal who refuses to enter forfeits to the superior the full rents of the lands from the date of citation is subject to exceptions, according to the discretion of the Court; and the circumstances of the present case, at least, giving rise to so much reasonable doubt, if not to absolute certainty, in favour of the respondents, entitle it to an exception from that general rule, as they have never been contumacious, or wilfully refused to enter.

After hearing counsel, LORD MANSFIELD moved to affirm without assigning reasons. It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Henry Dundas, Ar. Macdonald, Andrew Crosbie.*

For Respondents, *Al. Wedderburn, Ilay Campell, Gilb. Elliot.*

Not reported in Court of Session. A point of form in the case is noticed in Brown's Suppl. "Tait," p. 460.

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JOHN SHAW STEWART, Esq. - - - - *Appellant.*  
The MAGISTRATES and COUNCIL of Greenock, *Respondents.*

House of Lords, 2d March 1779.

CHURCHYARD—GROUND TAKEN FOR DO.—PARTIES TO SUIT—SUPERIOR AND VASSAL.—Held in the Court of Session, that by law, the ground to be chosen for erecting a new churchyard, is a burden upon the heritors of the parish; and the ground contiguous or adjoining to the old churchyard is to be set off, reserving to the heritor relief for the value against the other heritors, unless otherwise agreed on. Where action had proceeded and had been discussed on the merits, without objection to certain parties being called, appeal was taken to the House of Lords, where the objection was taken for the first time. Interlocutors in consequence reversed, without prejudice to call additional parties, or bring a new action. Question: whether a superior is bound to grant a feu-charter to a kirk-session, of ground for churchyard.

The ground on which the town of Greenock is built, belonged in property or superiority, to the appellant's ancestor, Sir John Shaw, then of Greenock. The town, which was then inconsiderable in size, and the adjoining country, formed one parish, having one church and churchyard. But the rapid increase of the population, from the shipping commercial traffic of the place, so extended the town that in 1741 it was necessary to subdivide the parish, and build

another church, which was done accordingly, by decree of disjunction, obtained before the Lords of Session, as Commissioners for Plantations of Churches. This decree disjoined certain parts of the town from the old parish, and erected the same into a separate pastoral charge, to be called the new church and parish of Greenock, with this *proviso*, that Sir John Shaw and the other heritors were not to be liable, nor their teinds or lands, for payment of stipend to the minister of the new parish; or for building, upholding, or repairing the church, manse, or school-house, or *any other parochial burdens whatever*, but that the whole parochial burdens should be borne by the baillie, feuars, and inhabitants of the burgh; this having been previously agreed upon between them and Sir John, in respect of the latter giving up all right to the patronage of the new parish, which by law belonged to him.

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Nothing was said in this decree or proceeding about a churchyard; but, in consequence of the vast increase in population and extent of the town, the old churchyard soon became insufficient. Accordingly, some years after the new parish church, manse, and school-house were erected, the magistrates, on a representation made to that effect from the new kirk-session, applied to the appellant and his father to give the ground required, on the principle, that as owner of the ground contiguous and proper for the purpose, he was bound in law to furnish it, and that he must take his recourse *for the value* against the other heritors or landholders of the parish. This was refused, because in effect it was making him give ground for nothing, ten parts in eleven of the valuation of the parish belonging to him. Action was then brought against him by the Magistrates to compel the appellant to set off as much of his ground as was sufficient for the purpose of a churchyard for burying the inhabitants of the town and parish, and to adjudge and declare the ground so set off to be part of the common burying place, and the management thereof vested in the kirk-session. Submitting whether the appellant was entitled to any recompence from the other heritors and feuars of the parish, and if he was, that these heritors and feuars should be obliged to pay to the appellant their respective proportions of the value; and for that purpose they also were made parties to the action, but the kirk-session of the new parish of Greenock were not made parties. The defence given in took no notice of this, and was confined to an admission, on the part

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of the appellant, that he, as contiguous patron, was bound to furnish the ground, but insisted that he was entitled to a fair and adequate price. The discussion which ensued had reference chiefly to the locality to be allotted for that purpose. The respondents, on their part, insisting that ground should be set apart adjoining or contiguous to the present churchyard, and wished to appropriate the whole gardens and back grounds of a street called the Kirk Town, in a way that the churchyard would have touched the walls of the houses, whereas the appellant could only consent to give them such a space as would leave these back gardens belonging to the houses untouched, and sufficient area for new houses when the old were pulled down.

July 31, 1776. The Lord Ordinary found, that " a burying ground " is a burden which nature, law, and reason lay upon the " heritors of every parish, and that the ground most com- " modious for the purpose, falls to be appropriated thereto, " and that the person whose ground is taken, is entitled to " have the value refunded to him by the several heritors, con- " form to their valuation, he himself bearing his proportion " thereof, which falls to be discounted from his claim against " the other heritors : Finds, that it is proper the ground to " be set apart, by way of addition to the present churchyard, " shall be contiguous and adjoining to the present church- " yard, and that it is proper that it should be of dry soil, that " being more commodious for the people who attend funerals, " especially in winter ; and also, in respect dead bodies do " sooner consume in such soil ; and that the consideration " of the convenience and propriety of the ground must de- " termine ; and what is urged in behalf of the defender Mr. " Shaw Stewart, that the ground pointed out by the pursuers " for this purpose is more valuable than what he insists should " be taken, is in so small a spot as is here needed no ways " be regarded, but before fixing the particular spot, appoints " a sketch or plan of the present churchyard and grounds " immediately adjacent, to be given."

Dec. 20, 1776. His Lordship thereafter found the ground pointed out by the pursuers was the most suitable, and ordered it to be set apart accordingly. A reclaiming petition was presented to the Court, submitting that the ground pointed out by the appellant was the most suitable, and that the payment fell to be made by the town, or its inhabitants, and not by the heritors of the old parish. At this time it was not known, and not pleaded, that, by the terms of the decree of disjunction above referred to, the town was bound to relieve the

heritors of the landward parish of all *parochial burdens*, under which clause churchyards must be included.

The Court still held that the additional burying ground was nearer for the parish, a portion must be furnished by MAGISTRATES OF GREENOCK. found the heritors who furnish the same must be indemnified by the other heritors, and by *the community of the town of Greenock*, in proportion to the examinable persons within the parish, and within the community respectively, and further ordained Mr. John Shaw Stewart to give in a condescension of the ground he proposes to furnish, both as to quantity, situation, and price demanded by him.\*

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\* *Notes from Lord President Campbell's Session Papers.*

*Shaw Stewart v. Magistrates of Greenock.*—Vol. xxxii.

**HAILES.**—“I think the session have nothing to do with it, except by concurrence of the heritors for behoof of the poor. The heritors are not bound to furnish ground to a town without indemnification; and if bound to furnish ground, they may do it in place most convenient for them. Entitled to charge.”

**BRAXFIELD.**—“The general rule as to parochial burdens, is, that they are to be borne by the heritors according to the valued rents. For the most part this rule is equitable, but not always. In case of church, burgh, and landward parish, must accommodate each other while they remain one parish. When a new church is to be built, first a plan ought to be made, then to consider what proportion necessary to answer each. If inhabitants of burghs double, then give them two-thirds of the area, and pay expense of building accordingly. The same rule applies to churchyards. No doubt the ground must be provided by the heritors; but it is a question who is to be at the expense. There is no obligation on the heritors to accommodate the town. They must, therefore, be reimbursed so far by the town. Suppose nine-tenths of this the proportion. As to the administration; if there is a common burial place, after setting off to each a proportion, it ought to be vested in the Magistrates for behoof of the community. No difference between royal burgh and burgh of barony.”

**COVINGTON.**—“The rule of the act of Parliament never can apply. Suppose village.”

“ Servitude on moss.”

“ Always (churchyards ?) subject to after augmentations.”

“ At present must give what will accommodate. Rule (as to expense) ought to be the real rent. This done in West Kirk.”

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Aug. 9, 1777. Five were condescended on by the appellant. Objections were stated to those, such as one place had bad access, another wet, another *within* town, and at last the new kirk-session proposed a piece of ground at a considerable distance from the town, while the original demand was to have ground set apart next to the old churchyard. The piece of ground at the distance was let on lease by the appellant to James Bartholomew; and the Court, concurring in this last proposition, pronounced this interlocutor, finding "that the piece of ground lying on the road to Innerkip, and distant 139 falls from the Mid Quay of Greenock, is the proper place to be chosen for the burying ground, found the value or grassum to be paid by the new kirk-session to John Shaw Stewart to be £165, with £3. 6s. 8d. sterling of feu-duty, and ordained him, on payment of the said grassum, to grant a feu-right to the new kirk-session; reserving to the tenant of the ground set of, to be heard for any claim of damages he can qualify."

Dissatisfied with the value fixed on, as well as with the ground set apart, which was just in a line with the direction which the fine buildings of the town were likely to take; and also discovering that the case had assumed a new shape, and that all parties interested had not been called, he brought the present appeal to the House of Lords.

*Pleaded for the Appellant.*—The new kirk-session, not having been made parties to the action in any shape, the Court ought not to have allowed any proposals by them to

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PRESIDENT.—“Lay a proportion on the burgh and the heritors, according to number of inhabitants. The situation of ground ought to be without the town, unless they can agree on what will be cheaper.”

GARDENSTON.—“I am surprised at this question. Sir John ought to have accommodated the town. He looks too narrowly to his interest. The town is not obliged to purchase the whole ground. He must bear his share. Many of the inhabitants his tenants or feuars. Must value a rent on the whole cost. Must arrange the rent payable to himself in the village. D. Cathcart also an interest. As to situation, the convenience of the heritor who furnishes the land ought to be considered.”

PRESIDENT.—“Roll of examinable persons.”

“Find that town and country must relieve one another, according to number of examinable persons in each, and to condescend on the ground.”

influence their judgment. The respondents (pursuers) further insist that the appellant convey to the kirk-session the ground in question, but the kirk-session is no party to this suit, although it is insisted that the management of the burying ground shall be in them. The lessee of the ground chosen is not made a party, yet he had a material interest, and there was no evidence whatever adduced, or allowed, as to the value of the ground taken. But these irregularities in form are not all he had to complain of. Looking to the locality and situation of the ground, he was greatly injured in the value put upon it. Whether the heritors, the town, or the kirk-session, were the proper parties to pay, it was incontestable that he was entitled to the full value. No proof of this was taken, but the Court proceeded on a mere extrajudicial proposal of the kirk-session. The value is material, for, as superior, he was not bound in law to receive a corporation which never dies as his vassal, because he would thereby lose his casualties. If he receives it, it must only be in consideration of certain periodical payments, expressly stipulated in lieu of the casualties. Vesting the right in the kirk-session, will be a disadvantage also to the superior, because it will render it impossible for him to enforce payment of the feu-duty or rent reserved. No personal action can lie against the kirk-session. They have no corporate funds to attach. And there can be no poinding of the ground, there being no fruits in the churchyard to be poinded. But, besides, the ground chosen being let on lease, of which eleven years were yet to run, involves the superior in an action of damages at lessee's instance, which has not been taken into consideration at all.

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*Pleaded for the Respondents.*—The furnishing burial-ground for the purposes of sepulture, is a burden which public necessity as well as law lays upon the heritors, who have ground proper and convenient for such purpose, and who may be compelled to set off such ground, upon being proportionably relieved by the other heritors. And the appellant, in this case, has, instead thereof, been found entitled to the full value of his ground from the new kirk-session. And the value fixed for that ground is full and adequate, and much higher than the adjacent ground.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed, without prejudice to the pursuers (the respondents in this appeal) insisting upon their title

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and claims, either by adding proper parties to the present summons and suit, or by raising and commencing a new summons or suit, for bringing all proper parties before the Court of Session, and thereupon to proceed as they shall be advised.

For Appellant, *Henry Dundas, Ar. Macdonald.*

For Respondents, *Al. Wedderburn, Alex. Murray.*

**NOTE.**—In the report of this case in the Court of Session, it is stated that after the interlocutor of the Court, 5th July 1777, the case was settled by Mr. Shaw Stewart accepting the offer of the new kirk-session; but this appears erroneous, from the subsequent interlocutors of the Court and appeal to the House of Lords. The reversal of the judgment is not noticed, M. 8019, “Kirk-yard and App. 1, No. 1. *Vide Dunlop, p. 80.* The reversal in the House of Lords on point of form, leaves the principle as fixed in the decision unaffected, although the judgment cannot be founded on as an authoritative determination. Mr. Dunlop, (*Parochial Law, p. 82.*) says, “that there are certainly strong grounds on which to support that judgment, although, at the same time, the strict interpretation the Court have lately put on the obligations of heritors, in regard to *churches*, may justly lead to doubt how far they would impose on them a burden nowhere laid on them by Act of Parliament.”

JOHN ALSTON, ALEXANDER ELLIOT, WILLIAM }  
COLQUHOUN, and Others, - } *Appellants;*  
MESSRS. COLIN CAMPBELL & Co., Merchants }  
in Greenock, and JOHN M'ALLISTER, } *Respondents.*

House of Lords, 3d March 1779.

**SALE ABSOLUTE OR QUALIFIED—INSURANCE—INSURABLE INTEREST.**

—A party sold a vessel to his creditor, under a vendition *ex factis* absolute, but, as shewn by the correspondence, was intended as a security for his debt. He thereafter insured the vessel. Held, on her loss, that he had still an insurable interest,—the sale being merely in security.

Richard Caldwell was owner of the ship *Frederick*, then on a foreign voyage, and being pressed for money by the respondent M'Allister, who was his creditor to a large amount, Caldwell, in order to satisfy him as far as possible, wrote him with certain securities. He says, “The securities I now enclose you are, 1st, A bill of sale of the Snow Fred-

" erick, for which I paid at the outset of her present voyage, 1779.  
" £700."

There was also an assignment of her freight home, and of ALSTON, &c. goods sent out with her.

The bill of sale was an absolute transfer of the ship to M'Allister. The advice from the Captain of the vessel at the time was, that she was then at St. Christopher's, and intended to proceed from thence next day to Jamaica; and M'Allister soon after the sale, procured an insurance of the vessel, on the voyage from Jamaica to her port of delivery in Great Britain or Ireland; but did not succeed, on the terms of premium offered, to procure an insurance for the voyage from St. Christopher's to Jamaica.

The other respondents, Colin Campbell and Company, being also creditors of Caldwell, advised Caldwell to insure the vessel on her voyage from St. Christopher's to Jamaica, and, as a security for debt due them, to open the policy in their name. This was done accordingly some weeks after the sale of the vessel to M'Allister.

The vessel was lost on her voyage from St. Christopher's Dec. 28, 1773. to Jamaica in August, previously to this policy,—intelligence Date of Po- of which being only received on 17th January 1774. licy.

The present action was brought against the underwriters, for the sum insured on the vessel in Colin Campbell and Company's names. To which the defence stated was, that Nov. 1733. the vessel having been previously sold by Caldwell to M'Allister, Caldwell had no insurable interest in the ship at the time of effecting the insurance, and therefore could not recover. To this defence, it was answered, that the sale of the ship to M'Allister was merely as a security for the debt due to him by Caldwell, a fact proved by the correspondence between both at the time of entering into the transaction, and adduced in process. M'Allister also put in his claim. July 9, 1777.

The Lord Ordinary found, "after considering the correspondence between Caldwell and M'Allister produced, finds that it is now unnecessary to resort to the opinion of merchants, as the case must be determined on a rational and legal construction of said correspondence, as relative to the bill of sale or vendition of the ship. Finds, that though the bill of sale is, by its tenor and *ex facie* an absolute vendition, yet the same is qualified by the relative correspondence of the parties, which imports only a conveyance in security of the ship, and other particulars mentioned in the said correspondence. Finds, notwithstanding this

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ALSTON, &c. "conveyance in security, Caldwell continued to have such legal property and interest in the ship, as entitled him to make insurance upon her; therefore alters the former interlocutor, finds the pursuer entitled to recover the insurance money, and decerns."

On reclaiming petition, the Court adhered. And an interlocutor was afterwards pronounced, preferring Campbell and Company and M'Allister, *pari passu* to the sum of £800, Aug. 8, — which, on representation, was adhered to.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—The policy was void for want of interest, Caldwell having previously sold the vessel to M'Allister, by a vendition *ex facie* absolute and unqualified. His insurance in name of Colin Campbell and Co. was therefore invalid, and was not recoverable. Nor was the evidence offered to qualify this deed of vendition admissible, because, although the letters were properly authenticated, it was clear they rather confirm the nature of the deed than qualify its import.

*Pleaded for the Respondents.* The real transaction, as shown from the whole circumstances and evidence adduced, was no more than a security lodged with M'Allister, the value whereof would of course be allowed to Caldwell when made effectual; but till then his demand against Caldwell remained the same. As, therefore, the loss of the ship must have been sustained by Caldwell, an interest subsisted in him sufficient to support the insurance effected. And this even though the benefit should accrue to M'Allister, as involved in the pledge.

After hearing counsel, Lord Mansfield moved to affirm. It was therefore

Ordered and adjudged that the interlocutors be affirmed, with £80 costs.

For Appellants, *J. Dunning, Gilb. Elliot.*

For Respondents, *Al. Wedderburn, Ar. Macdonald.*

Unreported in Court of Session.

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(M. 10702.)

DAME ROBINA POLLOCK or CRAWFORD, *Appellant.*  
 MARY LOCKHART, relict of JOHN LOCKHART of Lee, - - - - } *Respondent.*

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SHORT  
v.  
SHORT.

House of Lords, 10th March 1779.

## PRESCRIPTION—FOREIGN SUCCESSION.

For full report of this case, see (M. 10702.)

Where an English trust was created of estate in England, vested in English trustees in the English form; but for the benefit of parties natives of Scotland; and the trust fund having not been put to the uses mentioned; but transferred by the trustee to the first party beneficially called to succeed. Forty years after the present action was raised by the Scotch party, deprived of the benefit. Held, in the Court of Session, that the Scotch law of negative prescription, and not the English law, fell to be applied, and that the right of the parties favoured by the trust was cut off by the negative prescription.

Affirmed in the House of Lords.

For Appellant, *Al. Wedderburn, John Maddock.*For Respondent, *Ar. Macdonald, J. Dunning.*

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[M. 5615.]

THOMAS SHORT, Optician in Edinburgh, *Appellant;*  
 JOHN SHORT, - - - - *Respondent.*

House of Lords, 19th March 1779.

## CONQUEST.

For full report of this case, *vide Morison, p. 5615.*

A brother dispossessed heritable bonds to his immediate elder brother, his heirs and assignees. Both brothers died without issue. The eldest son of a brother elder than either, claimed it as conquest. Held, in the Court of Session, that he was to be preferred as heir of conquest to their younger brother, who claimed as heir of line.

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 v.  
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On appeal to the House of Lords the appeal was dismissed, it appearing to the House that all the persons interested were not made parties to the said appeal.

For Appellants, *David Graeme, Dav. Rae, J. Anstruther.*  
 For Respondents, *Al. Wedderburn, John Munro.*

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[M. 8383.\*]

Dr. STUART THREIPLAND, Physician, Edinburgh, *Appellant;*  
 JOHN WALSH and Others, Creditors of the }  
 York Buildings Company, - - - } *Respondents.*

House of Lords, 15th April 1779.

BANKRUPTCY—POWER OF GRANTING LEASE.—A company after adjudications had been led against their estates, and ranking and sale was raised, but superseded, and a petition to sequestrate presented to the Court, granted a lease of one of their estates for 99 years. Possession followed for 30 years, the company receiving rent from the tenant in the knowledge of the company creditors. In a reduction to set aside the lease by the creditors, on the head of bankruptcy, held, reversing the judgment in the Court of Session, that the lease was not reducible.

The York Buildings Company became proprietors, by purchase, of all the forfeited estates in Scotland, amongst which was the estate of Fingask.

A lease of the estate of Fingask and Kinnaird was granted Mar. 22, 1745. by the company, of this date, to Mr. Drummond, his heirs and assignees, for the space of 99 years, to commence at Whitsunday 1745, at a yearly rent of £480. 6s. 4d. Upon May 18, 1752. this lease possession followed, and the lease was thereafter assigned to the appellant, Dr. Threipland, for payment of the same rent, upon which assignation followed, and was continued up till September 1777, when the present action of reduction was brought to set it aside, by the creditors of the York Buildings Company, under the following circumstances:—

For some years prior to the lease, the York Buildings Company had been in difficulties. They had borrowed large sums to carry on their undertakings, many of which failed

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\* This case and the one following are imperfectly reported in Morison.

and turned out unfortunate ; and they were obliged to grant heritable securities over their several estates in Scotland. They had also availed themselves of an act of Parliament which permitted them to raise money by lottery, for which they were to grant annuities, and under this act they had granted annuities to the extent of £10,000 per annum :—the estates being dispossessed in security of these ; but reserving power of sale ; and also providing that the said annuities were not entitled to enter into possession by mails and duties, unless annuities fell in arrear and were not paid. Thereafter more money being required to pay the casualties of the company, it was borrowed, the company executing a trust-deed, securing the lenders over the remainder or reversion of their estates.

In 1732 the annuities got into arrear, from inability of the company to pay them ; and actions of mails and duties were raised, and possession had, by uplifting the rents.

Some three years thereafter, two successive rankings and sales of the estates were raised, but dismissed from informalities in the procedure. The last of these was pending at the time the above lease was granted to the York Buildings Company ; and a petition had actually been presented in December 1744, by the creditors, setting forth that the company and annuitants were not fairly managing the estates, but, on the contrary, granting renewals of the leases at low rents, far below their value, and praying the Court to sequester the rents. Upon this petition the Court pronounced an order, prohibiting and discharging the company June 14, 1745, from granting any leases of their estates “in the meantime.” But, notwithstanding this order, the company had, between the date of presenting this petition and the date of the order pronounced, granted the lease in question.

In these circumstances, it was sought to be reduced, after possession was had upon it for a considerable number of years, and on the following grounds :—1st. That the company was insolvent and bankrupt at the time of granting it. 2d. That they were inhibited at the instance of the adjudging creditors. 3d. That they were inhibited expressly by the above order of the Court.

In defence, it was stated that the lease was gone into in *bona fide*—that the parties had been two years in treaty previously—and that, from the correspondence, it was clearly shewn that the lessee did not reap any advantage by the

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lease. On the contrary, that, from the ruinous state of the houses, &c., it was a disadvantage, and that the petition for sequestration had never been intimated to the appellants. The company may have been in embarrassed circumstances, but it was not insolvent, nor divested of its estates, and so had power of granting leases.

July 1778.

Of this date, the Court, on report of the Lord Ordinary, "sustained the reasons of reduction of the tack or lease of "the lands of Fingask and Kinnaird, and reduce and decern "and declare, in terms of the libel; and find that defenders "must remove from the possession of the lands contained "in the above tack or lease." On reclaiming petition the

July 24, 1778. Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—Admitting the procedure to have taken place, above set forth, against the company, it did not amount, in the eye of law, to bankruptcy. The ranking and sales ended in nothing, and the trust-deed in favour of creditors, along with the adjudication, did not amount to bankruptcy. They might infer insolvency, but insolvency, however notorious, does not carry any disabling consequences along with it, and most assuredly could not disqualify the company from granting the lease in question, if they otherwise had power so to grant it. But, in point of fact, the company were not even insolvent. They were unfortunate, it is true, but in so far as their real assets were able to pay their debts, they had a prospect at the time the lease was granted of being rich. But any investigation into this is immaterial to the appellant's case, because he saw the company in the actual possession of their estates, and entered into the lease in *bona fide*. His possession has been acquiesced in for 32 years, and he has paid his rent and received discharges, which homologates that possession. The only question which remained, therefore, was, Whether the company, at the date of the lease, had power to grant leases? and if so, whether they had exercised that power in a legal manner in granting the present lease for 99 years? From the whole circumstances adduced, there was nothing which prevented the company, as unlimited owner, to grant the lease in question. The act of Parliament even permitted them to sell. And the first prohibition which appears is the Lord Ordinary's interlocutor of 14th June 1745, pronounced on the petition to sequester, lodged six months earlier, but the parties had been two years previously in

treaty about the lease, and the lease itself was granted three months before this action. The ranking and sales, the inhibitions and adjudications, did not form a bar to granting such lease—the former were void and ineffectual, the latter are mere incumbrances, which are ineffectual, unless possession follow, so that at the date of the lease the company had the power, and were not prohibited, from granting the lease in question.

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THRIEPLAND  
v.  
WALSH, &c.

*Pleaded for the Respondent.*—The York Buildings Company were notoriously bankrupt. Their whole estates were attached at the suit of their creditors, by every mode of diligence and execution known in law, and actually in possession of these creditors long before the lease in question. The creditors had commenced suits to compel the tenants to pay their rents, to which they, of course, were cited as parties. In these circumstances, and more especially pending an action of judicial sale, it was not in the power of the company to grant leases without the concurrence of the creditors. But the lease in question was in effect an alienation of the estate in defraud of prior creditors. It being granted for 99 years, it was tantamount to a sale of the whole estate. By the law of Scotland, a bankrupt is justly held to be divested of his effects, and his hands tied up by the diligence of his creditors, so as to prevent them from doing any act to their prejudice. No man can pretend ignorance of the records where their incumbrances and inhibitions may be seen, and none can pretend ignorance of a judicial sale; and if this lease, from its duration, be held to be a sale, then, as no private sale of a bankrupt, pending a judicial sale by his creditors, is valid, it follows that the lease in question is void and null, and the respondents have a material interest in setting it aside, because it was granted for a considerably diminished rent, and by collusion, whereby their interests have been greatly prejudiced.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be reversed, and the defender assailed.

For Appellant, *Al. Wedderburn, Alex. Murray, Dav. Rae,  
J. Anstruther.*

For Respondent, *Henry Dundas, Ar. Macdonald, Islay  
Campbell.*

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[M. 8380.]

FORDYCE      Dr. FORDYCE      - - - - -      Appellant.  
 v.  
 CREDITORS OF THE CREDITORS of YORK BUILDINGS Co. -      Respondents.  
 YORK  
 BUILDINGS CO.

House of Lords, 16th April 1779.

BANKRUPTCY.—Circumstances in which a lease held reducible on the head of bankruptcy, at the instance of the grantor's creditors. Affirmed in the House of Lords.

THE York Buildings Co., while their creditors were taking Dec. 1744. steps against their estates, and between the date when a petition to sequestrate the same, and the order pronounced June 15, 1745. sequestering the estates, granted a lease for 39 years, while the old lease was still subsisting, and had yet five years of its term to run. The lease was dated 24th April 1745, and set forth:—“Whereas the said Governor and Co. are willing “to continue their tenants or lessees, who take proper care “of the lands, and pay duly the stipulated rents thereof, “and are also inclined to have their rents improved and paid “to them in the city of London, and have resolved to grant “a further term of thirty-nine years, after the determina- “tion of the said present lease, to the said Mr. David For- “dyce, (appellant's father,) his heirs and assignees; and “the said Mr. David Fordyce being willing, without hurt or “derogation to the lease, or prorogation above mentioned, “presently subsisting, to accept the said further term of “thirty-nine years, at the rent, upon the conditions, and with “the reservations therein mentioned, and likewise to pay “the additional rent therein mentioned: Therefore, they “set and let the lands of Belhelvie, &c. for the space of five “years then to run, from the term of Whitsunday 1745, of “the aforesaid last mentioned lease, thereby renewed and “confirmed, and for the further term of thirty-nine years “now granted, making in whole forty-four years, from Whit- “sunday 1745.”

There was an increase of £25 of yearly rent; but it was alleged that this was trifling, and that the rent of £525 was far below the real value. The proven rental in 1719 was £557. 4s. 7d. after all deductions. The rental in 1776 was £1000, whereas the increased rent paid was only £525. It was alleged that Fordyce had paid the governor of the company a gratuity of £130 for the lease; and in the petition for sequestration, it was stated, that the company were in the course of granting leases and renewals of old leases, at

rents far below their real value; and the Court, by their interlocutor 15th June 1745, prohibited the company from granting leases.

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YORK  
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Possession followed upon this lease.

The creditors having brought a reduction of the lease, and also a removing, on the ground that as the company were insolvent, and a ranking and sale of their estates, and an application to have them sequestrated pending, they were not entitled to let leases of their estates. That Fordyce could not plead ignorance, at the time this lease was granted, that an application for sequestration was then before the Court, as there was not only notorious bankruptcy and diligence of every kind, with the above process of sale, but the very lessees or tenants of these estates, among whom Fordyce was one, were in Court in a multiplepoinding at their instance, and summons of mails and duties against them, so that he was not in *bona fide* in taking the lease in such circumstances. Besides, it was granted while the former lease was yet unexpired, and manifestly at a rent far below its value.

On report of Lord Braxfield, Ordinary, the Court pronounced this interlocutor: " Sustain the reasons of reduction of the lease, or prorogation of the lease of the lands of Belhelvie, and reduce, decern, and declare in terms of the libel; and find that the defenders must remove from the possession of the lands contained in the above mentioned lease; but of consent of the pursuer's procurator, suspends the term of removal to the term of Whitsunday next to come, and decern in the removing accordingly; and of consent of the pursuer's procurators, find that the substack granted by the defenders before commencing this action, and whereon possession was obtained, does not fall under this reduction, but must remain good to the substacksman for the years yet to run of the respective terms therein contained, not exceeding the term of endurance of the principal lease or prorogation now reduced; and of consent of the pursuer's procurators, find that the defenders are not liable for any higher rent during their possession, than the rent due by the said lease now reduced."

On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The only question here is, Whether at the time the lease was granted (April 1745) the

July 23, 1778.

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York Buildings Co. had power to grant leases, and whether, in granting this lease, they have exercised that power in a legal manner. It is quite clear, as proved by the record, that the company were under no prohibition to grant leases prior to the 15th of June 1745, when the interlocutor of the Court was pronounced, prohibiting them from so doing; and the question is, were they under any other restraint from so doing before that interlocutor? The very interlocutor itself presupposes that they were not under such restraint, because, how would it judicially prohibit, if the company were already debarred from so doing? And it is therefore clear that the inhibitions, the adjudications, and the ranking and sale, all of which existed prior to the application to the Court, could not operate as a prohibition, otherwise why did the creditors apply to the Court after the dependence of all these proceedings, for a judicial prohibition? But even supposing the ranking and sale effectual to restrain, in ordinary circumstances, the granting of such lease, yet as that process, in this case, had been cast from informalities, and the second ranking and sale raised by the annuitants taken out of the way by an agreement with them, so that these rankings and sales have become ineffectual for that purpose. Nothing therefore remains but the embarrassed circumstances of the company, and the plea of litigiosity set up, in respect that before this lease was granted, a petition to sequester was before the Court. But these circumstances were not sufficient to divest the company of their right; and so long as they were undivested there is no principle in the law of Scotland for holding that they were debarred from granting such lease. There was, besides, no fraud—no unreasonable term of endurance, and no inadequate rent; but a full rent, increased by £25 per annum.

*Pleaded for the Respondent.*—The York Buildings Co., at the time of granting the lease, were notoriously bankrupt—their estates were attached by inhibition, by adjudication, and by ranking and sale; in short, almost every mode of diligence and execution known in law. In these circumstances, it was not in the power of Court to grant a right over the estates to the prejudice of their creditors. But, separately, the transaction respecting this lease was collusive and unfair, made five years before the expiration of the subsisting lease, and when no reason is assigned or pretended for renewing it at this critical period; but that the

lessee, knowing the embarrassment of the company, and the known disposition of the managers, took that opportunity to obtain a lease greatly to the prejudice of the creditors. The present lease, though not of long endurance, as the Fingask estate was, yet is sufficiently long to shew the purpose for which it was granted, namely, to deprive the creditors of an increased rent at its expiry. The lease was granted for a rent far below its value, and a lease so granted cannot stand in competition or prejudice the rights of inhibiting adjudging creditors.

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After hearing counsel,

LORD MANSFIELD, who moved the House to affirm the judgment, said :—“ Though I am satisfied with the decree, I rise to give your Lordships my reasons for thinking this case different from that of yesterday, (case of Dr. Thrieland,) and which I can collect from the minutes of the opinions of the judges. On the point of law, I continue of opinion, that in 1745, the debtors, notwithstanding the incumbrances to their possession, continued in the administration of the estates, so as to have the power of granting leases; but void, if made under covin, fraudulently, and to the prejudice of their creditors. I see several circumstances noted, in the opinions of the judges, wherein the two cases differ; and it is surprising they did not put their judgments upon these. In the last case, there was no evidence Dr. Thrieland's case. of notice to the lessee; no evidence that it was in consequence of the proceedings in the Court of Session that he applied for his new lease. He gave evidence from his letters of secret correspondence, that he looked upon it as a disadvantageous bargain, and prayed an abatement of rent, on account of ruinous houses; but, from affection to a family estate, being the heir of the family, he renews his lease, notwithstanding that it was a disadvantageous bargain. It appeared that he gave no gratuity or fine, but refused to give any; so far no covin. But here, in this case, Mr. Strachey is the attorney employed for getting, and who executes this new lease; formal notice is given to Strachey's agent. All the cases put by Mr. Rae of private knowledge don't apply. There is here an *evidentia rei* that it was in fraud of his own knowledge; and that this knowledge operated after the proceedings on the petition: there was no application for the lease before April.”

“ There comes a circumstance last, of itself decisive. What is this *grassum*? A gratuity and corrupt price for the lease, not to the company at large, but to their officers; not appearing on the face of the lease, but given with notice of the complaint to the Court. I said yesterday, if there had been a fine, it would have made a material difference. There is another material circumstance in the minutes of the judges' opinions, that this was a lease in reversion, to take effect at the end of five years. It is not necessary, in the ad-

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ministration of an estate, or in the usual course of business, to grant a reversionary lease. Here, where acts or settlements give power of leasing, all the leases are in possession. This lease applies to the prayer of the petition, that the company should not grant leases. A sequestration would have had the same effect, and been granted to prevent this lease. This makes a material difference between the two cases."

"Another circumstance occurring in the former case, was, that besides the private correspondence, they produced the tenants' receipts for the first twenty years; and from the price of grain in that period, there was but a trifling advantage, and the length of the lease was accounted for. There was not a single bidder, (as my Lord Advocate observed,) who offered as a bidder to purchase these estates. The heir took them at neat fee-farm rent, a most eligible thing for the Company. But there is here no evidence *what* the estate did produce. There is proved now to a great excess of rent, about £500, and this lessee was an absolute stranger; and therefore no affection can be supposed to have operated for him."

"A great circumstance in which the two cases differ, is the acquiescence and ratification. Every person interested to make an objection, which may lie to a deed, may waive it by tacit consent, or by express words; the other lease was many ways notorious. There was a solemn and public circumstance, the action brought in 1756, complaining of the hardships on the part of the lessee. The trustees for the annuitants, who were ranked in the first place, Sir John Meres in the second place, the Duke of Norfolk in the third place, and the trust deed creditors in the fourth place, appeared and litigated with him, and insisted that he should be bound by his lease; and that the Court found him bound accordingly. This is a very strong circumstance of notoriety, and called on every body to challenge the lease. In this case, there is no notoriety or change of possession. There is a subsisting lease for five years. The registering the lease is not noticed. I don't know but it is a circumstance against the appellant; the lease being recorded in the register of probative writings the *very day before* the order of the Court to stop the company granting leases. It is no notice to the creditors. Indeed, the circumstance of the grassum is alone sufficient to decide this cause against the appellant. I am therefore for affirming."

It was therefore ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, Dav. Rae.*

For Respondents, *Henry Dundas, Ar. Macdonald, Ilay Campbell.*

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**JAMES LAWSON, Merchant, Glasgow,** *Appellant;*  
**JOHN TAIT, W. S., Trustee for the Creditors** }  
and Representatives of JOHN HAMILTON, }  
**deceased,** - - - } *Respondent.*

**LAWSON  
v.  
TAIT.**

**House of Lords, 28th April 1779.**

**BILL—PARTNERSHIP—INCOMPLETE CONTRACT—AGENT OR PRINCIPAL.**—Circumstances in which letters and other documents held not to prove that certain bills were granted merely as agent for a third party, and only to vouch the extent of the creditor's advances to that party until a certain share in his trade in Virginia was given to him; notwithstanding it was admitted that the money so received, and for which the bills were given, was appropriated for that third party's use, and he had agreed to give the creditor in the bills the share in the concern he desired.

Action was brought by the respondent in the Court of Session, against the appellant, for the sum of £3543. 13s. 10d. with interest resting owing, and due to John Hamilton deceased, upon bills granted by the appellant to Hamilton, in whose right the respondent sued. In defence, the appellant stated, that he had come under these acceptances only as agent for John Semple of Virginia; that they were intended simply to vouch the extent of Hamilton's advances for the use of Semple, till a certain share of a concern in Virginia was given by Semple to Hamilton, and that such shares having been accordingly given and accepted of, the bills could not afford ground of action against the appellant.

The defence was rested on the following correspondence, and other writings:—Mr. Hamilton wrote to Lawson. “ I have Mar. 23, 1764. “ not the least degree of hope that John (Semple) will give “ Sandy a share, or even that encouragement that he had a “ chance for from a stranger ; for John is 20 degrees farther “ removed from doing what is friendly and generous than “ before, as I never knew a narrow selfish mind, but these “ dispositions increased with riches.” Again, by another letter from Hamilton to Lawson :—“ I send you enclosed a April 10, 1764. “ copy of the letter sent you last week for Sandy, by which “ you may see my proposal and scheme for a 12th share, “ and the reversion to John if he shall think the profits of “ his purchase shall rise high above my computation. I “ would indeed rather chuse a sixteenth part, without any “ power of redemption.” He adds; “ If you think my bro- “ ther agreeing to the proposal I made will in any way hurt

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Aug. 29, 1764. Of this date, A. Hamilton wrote to his father thus: "As I wrote him (Semple) according to your directions, I did not think proper to insist much more about the matter, as they were pressing enough of themselves. He said he would give a share, but what that is to be I cannot find out."

Semple wrote to the appellant and Hamilton on the same Oct. 10, 1764 paper, as follows:—To the appellant he wrote, "Our brother in Mauchline has importuned me for one-twelfth share for Sandy Hamilton, which I have wrote him he shall have on the *bills* being honoured, and his assisting you therein." To Hamilton he wrote:—"It was my intention always, with your concurrence, that Sandy might have a share in our establishments and future trade. The one-twelfth part you desire him to have, on the bills I have drawn being honoured, and your assisting James Lawson in it, as you propose, he shall have."

It was averred that this letter shewed that Hamilton had offered to advance money for payment of Semple's bills, provided he would give his son the share he required.

Oct. 15, 1764. Semple wrote again to Hamilton:—"This serves to advise you, that on your assisting James Lawson, &c. to take up my bills I have drawed, and them being taken up this winter for the establishment of our Virginia concerns, that Sandy shall have one-twelfth part thereof, as you desire."

Hamilton then wrote Lawson, in reference to the above Dec. 16, 1764. letter:—"I received yours of the 12th, covering my brother's to you and me, which I must own is very agreeable to me, if it were in our power to answer what he requires, but am afraid that we cannot near do."

Thereafter an agreement was entered into between Lawson on the one hand, and Hamilton and Pagan and Crawford on the other, who respectively agreed to provide the means for retiring Semple's bills, in consideration of which, a certain proportion of the trade was to be conveyed to Hamilton and Pagan and Crawford. The agreement also bore, that Lawson was to write Semple for his concurrence, and for a formal obligation under his hand to convey these shares accordingly. It was provided, "that in case the said John Semple refuses to sign the said obligation,

" and return the same duly execute, then and in that event, " this present agreement shall be void and null." This contract commences : " And whereas John Hamilton did " advance part of the money (for which he has the said " James Lawson's security.)"

The contract and obligation were sent out for Semple's signature. A letter was returned, agreeing, which was intimated by the appellant to Hamilton, and on 13th April 1765, the obligation was signed by Semple, and was received by the appellant in July following. It was afterwards put on record, at the desire and expense of Hamilton.

As Semple had long previously expressed, by letter and otherwise, his willingness to give the shares in the concern, the parties, prior to the completion of the above obligation, had acted on this representation, and Hamilton had advanced £1500, which was declared to be part of the price of the purchases of the share from Semple.

He had also advanced four other sums, in terms of his engagement to provide money for paying the remainder of the price, and carrying on the works, *for three* of which (as he had done in regard to the first) the appellant granted his acceptances—this being done prior to any notice from Semple, and before the contract and obligation were sent out to him for his signature and concurrence.

The appellant was appointed agent for the concern, and kept a regular set of books where these advances were entered, of the date they were made.

But sometime previous, the following letters had passed. Hamilton wrote to Lawson :—" I am very sorry Aug. 22, 1764. " for this disappointment, but cannot help it ; but as I have " advanced for my twenty-fourth share (he had not by this time got Semple's answer with respect to the share for his son) " more than both Messrs. Pagan and Crawford have " done for their twelfth share, I am confident they will find " out £500 to assist you in the meantime, and the above " mentioned £500 will answer another turn, and think you " should apply to them for that end." He again wrote the appellant :—" I wrote for the loan of £2000, which is all I Oct. 27, 1764. " could propose to borrow upon my subjects ; for the folks " in Edinburgh will not lend money but upon an heritable " security ; and I can see no help for it but allow John's " (Semple's) bills to return for the other £1000 you mention ; and, after all, I am diffident of *his* subscribing and " returning the obligation for the eighth share ; and therefore I think you should, in the meantime, meet with Messrs.

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" Pagan and Crawford, in company with two or three more,  
 " and advise them of the draught for £3000, and ask them  
 " to assist you to advance it; and if they tell they cannot,  
 " it certainly should be an argument with the arbitrators  
 " between you and them, to modify their claim of damages,  
 " if John does not agree to give the eighth share. You  
 " should not let them to know that I am to give any further  
 " assistance. This I beg you will not neglect to do, as, in  
 " the event of John's refusing, it must be of real service to  
 " you. If I can furnish this £2000 I will accept of the for-  
 " ty-eighth share you offer me of John's purchase, as I think  
 " it would be an argument to induce him to give it me him-  
 " self."

Nov. 29, 1764. Again Mr. Hamilton wrote to the appellant :—“ You see  
 “ by Mr. Tait's (the respondent) that he has prevailed with  
 “ the Commissioner Cochran to delay the payment till  
 “ Whitsunday. I hope in a short time we will have such fa-  
 “ vorable accounts from America as will enable me to satis-  
 “ fy him that my scheme is more for the interest of his  
 “ friend” (meaning the respondent's sister-in-law Mrs. Ha-  
 milton) “ and my family, than any thing else I can do or  
 “ propose. However, I am confident I will be able to pro-  
 “ cure the loan of the money to repay him at Whitsunday,  
 “ unless something occur that I know nothing of. I expect  
 “ to get the £500 from Mr. Tait which I had the promise of  
 “ formerly.”

In the summer of 1765 Semple's connections in Scotland were alarmed by the accounts which they received of the mismanagement of the whole concerns abroad. Pagan and Crawford had by this time advanced £3000, and Hamilton nearly £4000. The appellant himself was deeply engaged, Semple having, without his knowledge, applied the pro-ceeds of the Maryland concern, to the amount of £20,000, in payment of the purchases and carrying on the works at Virginia.

In this posture of affairs, the parties thus concerned solicited the appellant to go to America, to investigate into Semple's conduct and affairs, and to act for their interest. They gave him powers of attorney, which were subscribed by Hamilton, and he went to America, and found the affairs in a desperate condition.

On this being communicated to Hamilton at home, he wrote to the appellant :—“ Therefore my brother will do  
 “ well to make a just and exact state of the concern, and  
 “ sell off, to make us all easy, or take a partner in my place,

" who will advance money to pay what I am in advance, and  
" what he owes me and Sandy."

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Other letters followed, referring to the disastrous state of affairs. Some difference arose, and Hamilton wrote to Lawson.

Dec. 11, 1765.

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" If my brother had the smallest regard to justice, he April 8, 1766.  
" must consider that this large advance on my part, was on  
" the faith of his assurances, by his letters to you and me,  
" that he would have, before this time, remitted to pay off a con-  
" siderable part, and that I am in advance, (though I have only  
" an equal share with Messrs. Pagan and Crawford), four times  
" as much as either of them; and when I have wrote him  
" that I could not support my credit, he should have reinit-  
" ted me to have paid the interest, but, in place of that, he  
" has drawn upon me. I insist that you will settle ac-  
" counts with him, and remit me, in the meantime, £300 or  
" £400 to pay interest, and get undoubted security for pay-  
" ment of the rest, payable in Glasgow or Edinburgh; other-  
" wise, when I am pressed by my creditors, *I must make use*  
" *of the security I have from you, to answer my credit.*"

Again, " It is inconsistent with the nature of all partnership, May 12, 1766.  
" and any shadow of justice, (I may call it robbery), in  
" my brother to withhold a state, and refuse to give a full  
" and particular account of every part of his procedure.  
" These the other partners have a right to call for, that  
" they might judge for themselves, and as they see cause, to  
" give up the partnership or not. I have still a better  
" right, and I am determined, if my demands are not an-  
" swered to my satisfaction by the 1st August, to use dili-  
" gence on the bills." Letters followed in the same strain.

Of this date, Hamilton wrote Lawson :—" As I considered July 29, 1768.  
" yourself as having a share, and that you was acting as  
" agent for Mr. Semple, and that what money I advanced to  
" you more than paid the share conveyed to me, I was to  
" have your security, I continued to advance upon your  
" security by bill."

Sometime afterwards, the appellant, who, it was alleged, was himself a partner in Semple's concerns, managed to procure a settlement with Semple, for the benefit of all parties. At sametime, he advanced £1750 to carry on the works. The settlement was, by Semple granting an obligation and mortgage over his estates, to secure and pay the appellants and his constituents' claims, as follows :—States were made out, and five bonds were taken from Semple; one to Hamilton, another to Pagan and Crawford, and three to the ap-

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pellant, for their respective advances. And a mortgage granted, wherein the whole of these bonds were included, and heritably secured. The appellant thereupon executed a bond of indemnity to Semple, wherein there was this clause, "Whereas the above bound James Lawson, is answerable in security for the said John Semple, to the said John Hamilton, for the payment of the said sums," &c.

Sometime afterwards Semple died. Hamilton had pre-deceased him, having previously conveyed his estate to the respondent in trust. The present action was then raised, upon the four acceptances above set forth, which were granted by the appellant to Hamilton.

Previous to this, the appellant had written to the respondent :—“Yours of the 11th July, I received sometime last month; the contents of which, I observe, and think they are very harsh; also unreasonable in you to insist on me paying the money which you advanced, to retire Mr. Semple's bills for a concern wherein you was a partner, and I acted only as clerk or manager for the company. You never lent me one penny of all that money for any use of mine, but wholly to be applied in payment of the bills drawn on account of that concern, which the obligation you entered into will plainly shew,” &c.

Upon debate, the Lord Ordinary pronounced this judgment :—“Having considered the summons, with the several bills libelled; and having also considered the defences pleaded for the said James Lawson, answers, and together with the many and various letters, and other writs produced by either party; repels the defences pleaded for the said James Lawson defender, and finds the said James Lawson liable in payment to the said John Tait, pursuer, of the several sums of money following, contained in and due by the bills libelled, accepted by the defendant, (here the bills are enumerated.) “Finds that by the letter libelled, dated 26th January 1765, the defendant is not bound personally to pay the sum of £100, sterling, therein mentioned, and therefore assoilzies him as to that sum, and decerns.” On representation, the Lord Ordinary adhered.

Feb. 6, 1777. On reclaiming petition to the whole Lords, “The Lords having advised this petition, with the answers, find sufficient evidence that John Hamilton was associated as a partner in the purchases within mentioned, to the extent of one-twenty-fourth share; and find that the petitioner, (ap-

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" pellant) also was a partner to the extent of one-fourth; but,  
 " before further procedure, appoint the parties to give in  
 " memorials, first, upon the effect of the deed of mortgage,  
 " 1769, to relieve John Hamilton from his said partnership.  
 " 2d, If not so relieved; but continuing a partner, to what  
 " extent is the petitioner (appellant) entitled to retain, of  
 " the sums contained in the bills in question against Ha-  
 " milton, being a partner as aforesaid."

The appellant preferred a petition against this interlocutor, in so far as it found him to be a partner of the concern, but, of this date, they adhered. And, on the reclaiming petition of the respondent, the Lords adhered "to the former July 5. 1777. interlocutor reclaimed against, in so far as it finds John July 5, — Hamilton was associated as a partner in the purchases in question, to the extent of a twenty-fourth share, and in so far refuse the desire of the bill; and they further ordain the memorials on the other points of the case, appointed by interlocutor of 6th February last, reserving the consideration to what extent Lawson was concerned as a partner, till the said memorials be advised."

The appellant put in another reclaiming petition, as to his son's twelfth share.

The respondent contended, 1st, that if ever there was a partnership, it was put an end to by the mortgage; the whole tenor of which shewed that this was meant, and understood to be the effect of it; and, 2d, that the appellant could not therefore plead any retention. 3d, That the appellant was, besides, a partner with Semple, and as such liable.

The Lords find, that the effect of the deed of mort- Jan. 15, 1778. gage in 1769 did not liberate or relieve Hamilton of his copartnery, which is formerly found to extend to one twenty-fourth share. They further find Lawson to be a partner to the extent of one-fourth share only, and remit to the Ordinary to hear parties further on the other point, viz. To what extent is Lawson entitled to retain of the sums in his bills to Hamilton, on account of Hamilton's being bound to continue a partner as above; and also, to remit to the Lord Ordinary the petition for Hamilton; and answers for Lawson, relative to the interim decree craved by Hamilton, with power to his Lordship to do in the premises as he shall see cause."

When this interlocutor was pronounced, the appellant produced a bond of indemnity granted to him by Semple; by which, and the mortgage, he contended the intended copartnery was effectually extinguished by mutual agreement.

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Dec. 17, 1778. "in the company of Semple, finds that it is not now competent for him to grant the prayer of the representation," (which prayed to prove by persons recently arrived from Virginia, that no such partnership as that contended for by the appellant ever existed.)

Against these interlocutors the present appeal was brought by the appellant, in so far as they found him liable in payment of any part of the said bills, or him to be a partner in Semple's concerns. The respondent also presented a cross appeal, in so far as the interlocutors of the whole Lords found that John Hamilton was associated with Semple as a partner, and refused to find the appellant liable in the sums sued for.

*Pleaded for the Appellant.*—On the original appeal, the interlocutors of the Lord Ordinary, 16th July, and 10th August 1776, are clearly ill founded. No part of the money in suit was applied, or meant to be applied to the appellant's use. The whole was advanced by Hamilton, in the view of his obtaining a share for himself and son in Semple's concerns abroad, and for the purpose of paying the price of Semple's purchases in this country. The contract, August 1764, the correspondent obligation, with numberless letters under his own hand, place this beyond all dispute. · Hamilton obtained the object he had in view by those advances. He and his son were admitted to shares with Semple. The sums advanced were confessedly applied in the manner Hamilton meant they should : In effect they were applied for his own use, and upon an estate whereof he became part-owner. Of course, any claim against the appellant became extinguished *confusione*. Hamilton could not both have the share, and the price paid for the share. Accordingly, he himself acknowledged by his letters, that he had no claim against any person whatever, except for the surplus above the value of his share, i. e. above his proportion of the price of the purchases and expenses defrayed by Semple in erecting and carrying on the works. In his letter, of 28th July 1768, though at that period, it is clear from the other parts of the correspondence, he was disposed to relieve himself at any expense, yet he expressly admits, that it was not intimated he should have the appellant's security, except for the surplus above his stock. This was admitting, that, as to the value of his stock at least, the ap-

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pellant's acceptances neither were, nor could be meant to be securities, but simply vouchers for his advances to Semple, which sufficiently obviates the presumptions which the respondent deduces, from the terms of the contract and correspondent obligation, and from the circumstances of these bills not being taken up upon the arrival of Semple's obligation from *America*. In point of fact, there is nothing to shew that the appellant became bound to repeat or guarantee either his stock or the surplus. 2d, The appellant was no partner. He acknowledges that one may be admitted a partner by letters, as well as by a formal contract; yet, in every case, especially where the consequences draw so very deep, the correspondence must, in order to this effect, be very conclusive and direct. But, in the present case, those characters cannot be applied to the correspondence in question, which do not make him out a partner. There was merely an offer on the part of Semple to give him a one-fourth share,—and a declaration on his part, that he would take no less than a half. To this Semple never agreed. There was therefore no completed bargain between them, and therefore no partnership. 3d, Besides the one-twenty fourth share that John Hamilton got for himself, he got a twelfth share for his son, which is clearly established by the correspondence, shewing, when Hamilton demanded the twelfth for his son, Semple expressly agreed to it. **ON THE CROSS APPEAL.** The appellant further contended, that he was never a partner, he was only manager for the company, that the acceptances granted by him, were as agent for Semple, with whom Hamilton was associated as a partner,—that the books which he kept, containing the advances made by Hamilton, and for which he had granted his acceptances, shewed that these sums were appropriated for the behoof of the company. As, therefore, the advances made by Hamilton, (for which the bills in question were granted), were made for the purpose of purchasing shares in the concerns of Semple abroad, and as Hamilton, in consideration thereof, accepted of these shares, and became a copartner with Semple, it is clear that the respondent had no claim upon these bills against him. No doubt it is contended by the respondent, that supposing the copartnery existed, and to have been dissolved by the mortgage, the obligation upon the appellant, in consequence of his acceptances to Hamilton, would subsist in the same manner as if Semple had refused to accede to the contract betwixt Hamilton, Pagan and Crawford, and had not returned the obligation; but, in

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answer to this, the appellant contended, that a more unjust plea could hardly be figured. That a copartnery was formed was indisputable, and had been, times without number, admitted by Hamilton himself. The moment this result was effectuated between Hamilton and Semple, the appellant's obligations, come under by the acceptances, ceased and were extinguished. Thus matters stood, when the appellant went to America, furnished with a power of attorney, signed by Hamilton. He executed the trust reposed in him to the best of his ability. He succeeded in getting a security for Hamilton's advances, with interest; and it would be an extraordinary proposition, to hold that his negotiation of this transaction was to subject him in liability for Hamilton's advances.

*Pleaded for the Respondent.*—On the original appeal. The respondent's title to recover payment of the bills against the appellant is indisputable, and it lies upon him to prove that the obligation he thereby came under was *conditional*, and that the condition has taken place. His plea is, that he gave his own security for the money advanced by Hamilton, upon an understanding, that if Hamilton was admitted to a share of Semple's purchases and undertakings, then he was to be quit, and Hamilton's security to depend upon Semple, or the partnership estate. Thus admitting that he did once stand bound for the money, an admission which the appellant was obliged to make, to account for giving his own acceptances, in place of receipts, as the agent of Semple. But there is no evidence of such understanding or agreement between the appellant and Hamilton. The appellant relies on the letters and correspondence, as sufficient evidence, especially where Hamilton expresses his knowledge or belief, that the money was applied to the use of Semple, and he finds on the deeds where the same thing is set forth, and on other parts of the letters, where he seems to consider Semple as debtor to him. All this, it is apprehended, does not amount to evidence sufficient to elide the presumption which the bills themselves afford. Because these bills, taken together with other expressions in Hamilton's letters, particularly the deeds, which clearly expressed that he held the appellant personally responsible to him for his advances, were the most conclusive evidence to the contrary. 2d. No share of Semple's purchases and trade having been actually given to Hamilton, or in other words, no partnership having been formed or concluded, the appellant's obligation, according to his own shewing, still remains, because, the conditions upon which he says he was to be free from his

personal responsibility, has not existed, and never did exist. Until articles were executed, assuming Hamilton as partner, and until a due proportion of the purchases and property of the proposed partnership was conveyed to him, no share can be said to have belonged to him. The obligation of Semple was only a first step, necessarily implying others which were to follow, and, till these followed, there was no completed contract between them: and by Semple's death before this consummation, it must ever remain so. It seems admitted that Hamilton was ignorant of the extent of the purchases—the prices of them—the incumbrances upon them—the nature of the business proposed to be carried on—the capital required—the endurance of the partnership—all these things were undetermined, and it is therefore preposterous to suppose that, in these circumstances, there could be a concluded agreement. The mortgage and bond of indemnity does not prove that a partnership had been formed, and was thereby dissolved; but only, that a project or scheme for a partnership had been proposed, and put an end to, so that the appellant can draw no argument from these deeds. The interlocutors of the Court of Session, finding Hamilton associated with Semple, are therefore erroneous.—ON THE CROSS APPEAL. It is established by the letters and other documents, that the appellant was a partner, concerned in the Virginia purchases and works, upon the same terms that Semple and he were connected in the tobacco trade. And in regard to the attempt to have Alexander Hamilton, the son of John, declared to be a partner with Semple, it seems altogether incompetent, in the present action, to which he is not made a party, even if otherwise there was any foundation for it; but, further than a mere proposal, there are no ground for it whatever.

After hearing counsel, LORD MANSFIELD moved to affirm as follows:—It was

Ordered and adjudged, that the interlocutors of the Lord Ordinary in Scotland, of the 16th of July, and 10th of August 1776, complained of in the original appeal, be affirmed. And it is declared, that it being unnecessary precisely to determine the questions to which the other interlocutors complained of relate, it is, therefore, hereby further ordered, that the several other interlocutors complained of in the original and cross appeals, be reversed, without prejudice.

For Appellant, *Al. Wedderburn, Henry Dundas.*

For Respondent, *J. Dunning, Ilay Campbell.*

Unreported in Court of Session.

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[M. 15103.]

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SIR LAWRENCE DUNDAS, Bart., - - - *Appellant;*  
 His MAJESTY's ADVOCATE, and other OFFICERS  
 OF STATE for Scotland, on behalf of His  
 MAJESTY, and PATRICK HONEYMAN, vassals, } *Respondents.*  
 and Others, vassals of the Crown

House of Lords, 14th December 1779.

## PATRIMONY OF THE CROWN—SUPERIOR AND VASSAL.

For full report of this case, *vide* Morison, p. 15103.

Held, in the Court of Session, that the superiorities and casualties of the Crown lands, in Orkney and Zetland, formed a part of the Crown's patrimony annexed thereto *jure coronæ*, and could not be alienated or granted away by the Crown—such grants being illegal and unconstitutional, both as regards the rights of sovereign and vassal.

On appeal to the House of Lords. After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same is hereby affirmed.

For Appellant, *J. Mansfield, Ar. Macdonald, Chas. Dundas.*

For Respondents, *Al. Wedderburn, Henry Dundas, Alex. Murray.*

ROBERT HOGG Esq., of Ramoir, - - - *Appellant.*  
 MARY HOGG, Widow of deceased Robert Gordon, *Respondent.*

House of Lords, 14th February 1780.

IRRITANCY OF LEASE—PENALTY.—A lease provided, that if two terms rent were allowed to be “resting and owing unpaid at one time, the tack should *eo ipso* become void and null,” with a fifth part more of termly moiety in case of failure. The tenant fell four years in arrear of rent. In an action brought under the annulling clause in the lease: Held the irritancy purgeable at the bar; and that the penalty, in case of failure of a fifth part more, was not exigible.

Gordon had a lease from Hogg, of the farm of Ramoir, the stipulated rent of the first two years being £160, and for the remaining years of the lease £200. The lease bound the tenant to pay this rent, “and so on yearly thereafter, during the continuance of this lease, together with

"fifth part of each termly moiety of liquidate expenses, in case  
 "of failure, and the legal and ordinary annualrent thereof,  
 "so long as the same shall remain unpaid; declaring always,  
 "as it is here expressly provided and declared, that if two  
 "terms' rent shall be resting and owing unpaid, at one time,  
 "this present tack shall *eo ipso* become void and null."

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The tenant fell four years behind in arrear of his rent, and action was raised, reciting the above clause in the lease, stating, that, in terms thereof, he had fallen four years in arrear of his rent, and that the lease was thereby void and null, and concluding to have him removed. The sheriff allowed the tenant to purge the irritancy of the lease, by April 7, 1776. consignation of the whole arrears of rent, with interest due thereon. Against which interlocutor, an advocation was brought, in which the Lord Ordinary advocated the cause, July 15, 1778. and "assailed the defender from the conclusions of the re-  
 "moving in consequence of the clause of irritancy in the  
 "tack, granted by Robert Hogg to Robert Gordon, libelled;  
 "repels the articles of compensation claimed by the de-  
 "fenders, amounting to £22. 15s. 7d., in respect it appears  
 "from the discharges produced, that these payments were  
 "made to the pursuer for the rents of 1771. Finds the de-  
 "fenders liable in payment to the pursuer Robert Hogg, of  
 "the rents of the lands libelled, with interest of the same,  
 "from the several terms of Whitsunday and Martinmas, at  
 "which payment is stipulated to be made, by the tack libel-  
 "led, and the liquidate penalty as contained in the tack."

Both parties having reclaimed, the Lords found "the pe- Jan. 16, 1779.  
 "titioner (Mary Hogg) liable annually in a sum equal to  
 "the legal interest of the £22. 15s. 7d. within mentioned,  
 "from and since the term of Whitsunday 1773, and in time  
 "coming, till payment of the bygone rents in question; but  
 "find no interest due on the said bygone rents, and in  
 "case the said rents are paid to the pursuer, on or before  
 "29th January current, find that the bygone liquidate ex-  
 "penses for each term's failure are not due, or incurred,  
 "and decern; and, with the above variations, adhere to the  
 "interlocutors of the Lord Ordinary, reclaimed against, and  
 "refuse the desire of both petitions." On reclaiming peti- Jan. 28, 1779.  
 tion the Court adhered.

Against these interlocutors of 15th July 1778, 16th and 28th January 1779, the present appeal was brought.

*Pleaded by the Appellant.*—1st, The first question is, whether, in terms of the lease, the appellant is entitled to

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exact interest on the arrears of rent, and the liquidate penalty for expenses. The lease itself provides that the tenant shall be bound to pay the rent, and "the legal and ordinary annual rent thereof, so long as the same shall remain unpaid." Under this clause, there was an express right given to the landlord, by the agreement of parties, to exact interest on arrears. But, apart from such express agreement, and on the soundest principles of justice and law, interest ought to be allowed *nomine damni*. Nor is it any answer to this to say, that the respondent was always ready to pay the rents, and had actually offered payment, as evidenced by the letter offering to do so, because that offer being conditional, upon being allowed retention, or deduction of certain unfounded claims, was not a free tender of the money. 2d. Separately, the irritancy of the lease is incurred and not purgeable, and therefore the Court ought to have decreed in the removing, and not assailed the defender from the conclusion therefor. On the tenant falling two years into arrear, the tack was *co ipso* to become void and null, "and in that event the said Robert Gordon binds and obliges himself to flit and re-move himself." Where, therefore, as here, there is an express declaration in the lease itself, that it shall be, on non-payment of two years rent, *ipso facto* void and null, the irritancy cannot be purged at the bar, a doctrine laid down by the best authorities. In such a conventional irritancy, it requires no decree to declare the irritancy incurred. The nullity is settled and declared by the lease itself. And the tenant ought therefore to be removed, as his lease is at an end.

*Pleaded for the Respondent.*—1st, By the law of Scotland, penal irritancies are never interpreted with rigour, and every equitable consideration is admitted to negative their execution. Here a counter claim was the cause of the tenant refusing his rent, payment of which was offered, on condition of retention being allowed for it. He was, besides, prohibited from paying his rents, by an action raised by the superior, to compel the landlord to enter vassal with him, or to forfeit his right, which action being served on Gordon, was equivalent to an interpellation from paying the rent to him. The interest and penalty, in name of expenses for such year's failure, ought not therefore, in these circumstances, to be demandable. 2d, The irritancy contained in this lease, is the most rigorous that can be devised, or attempted to be enforced. If two years rent become in arrear, it declares the

lease eo ipso void and null, and thereby forfeited ; and the appellant contends that this is enough, without any decree of declarator of the irritancy. But the rule of law, that all irritancies are purgeable at the bar, necessarily supposes that all irritancies, to be effectual, must be judicially declared, and consequently, that the bare clause in the deed does not of itself annul the right. This seems according to principle, because it may often happen, that the non-performance is owing to some obstinacy on the part of the landlord. The tenant, in the present case, is willing to pay, and ought not to have penalties and interest exacted from him ; and any failure or contumacy on his part, while prohibited from paying, ought not to be so visited, and by a landlord who refuses to receive payment. Both of these facts apply here.

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After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be affirmed.

For the Appellant, *Henry Dundas, Dav. Rae.*  
For the Respondent, *Ilay Campbell.*

NOTE.—This case not reported in Court of Session.

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ANDREW WAUCHOPE, Esq. of Niddry,  
EARL OF ABERCORN, and SIR JOHN HOPE,  
*Appellant ;*  
*Respondents.*

House of Lords, 21st Feb. 1780.

LEASE OF COAL—RIGHT OF PROPERTY—SERVITUDE—*OPUS MANUFACTUM*—RECOMPENSE.—Circumstances where the level of a pit was communicated by the lessee to a neighbouring colliery, with proviso of the proprietor, that the level should not be communicated into any other neighbouring collieries, for the purpose of working the coal, to the prejudice of his original property ; Held, on communication of the level to the neighbouring collieries, that the appellant was entitled to have it shut up ; also held, in consequence of such communication, that the recompense due to him must be adequate to the benefit which has been enjoyed by the use of such level. There was a thick wall left in working the Niddry coal, which divided it from the coal of Woolmet, which stood higher up. The wall, consisting of porous coal, did not prevent the water from flowing down from the Woolmet pit to the Niddry coal. The proprietor of the latter was proceeding to make downsets to prevent this, when Sir Archibald Hope brought a suspension, contending that the Niddry coal, being the inferior

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tenement, and lower down, was subject to a natural servitude of receiving the water that came down from the higher colliery. Held, in the Court of Session, that Niddry was entitled to make the downsets. On appeal, remitted for consideration.

This is the sequel to the cases reported *ante*, p. 286 and 338.

By the last appeal, the House found that the appellant was entitled to have the level in question shut up by the respondents, and that they, Sir Archibald Hope, and Mr. Wauchope of Edmonstone, were liable to him in recompense, as may be just and reasonable, for the benefit they had enjoyed, by means of opening and communication of said level to their collieries. And as to the other point in the case, in reference to the procuring the consent of the Earl of Abercorn to the communication of the Duddingstone level to the Niddry coal, it was ordered, that the case may be remitted back to the Court of Session, with power to make the Earl of Abercorn a party to the suit, so that he may appear and plead for his interest, in regard to the lease granted by him to John Biggar.

In consequence of this remit, the case was again resumed in the Court of Session, and the Earl of Abercorn called as a July 5, 1774. party. In the meantime, the Lord Ordinary, of this date, ordered Sir Archibald Hope forthwith to shut up the level in the Gillespie seam, and to keep it shut in time coming, but Sir Archibald did not do this till October following.

The summons making the Earl of Abercorn a party to the suit, set forth, "That the level of Duddingstone coal, having "been, in virtue of the above lease, communicated by An- "drew Wallace to the coal of Niddry, during the currency "of the lease of the Duddingstone coal to John Biggar; "this communication must be kept free and open, in all time "coming, for the draining and carrying off the water from "the coal in the Niddry lands; and this being declared, the "Earl of Abercorn, and Sir Archibald Hope, should be de- "creed and ordained to make and deliver a deed to the "pursuer, ratifying and approving the communication of "the Duddingstone level to the coal of Niddry, and binding "and obliging them, jointly and severally, and their heirs, "to keep the communication of the said level free and open "in all time coming."

The appellant also amended his original libel against Sir Archibald Hope and Captain M'Dowall, to the effect of setting forth, "that neither the said John M'Dowall, nor

" his assignee Sir Archibald Hope, having any right to open  
 " or communicate the said Niddry level, without the pur-  
 " suer's consent, whereby he was justly entitled to recover  
 " from them such profits and gain as they had made by  
 " communicating the said level, and was likewise entitled to  
 " have the said communication of the level with the coals  
 " of Edmonstone and Woolmet, or any other coals not be-  
 " longing to him, shut up and secured, so as that no water  
 " might thereafter pass from such other coals into his level  
 " or coal of Niddry ; that therefore the said John M'Dowall,  
 " Sir Archibald Hope, and John Wauchope of Edmonstone,  
 " should be decreed, jointly and severally, to account for and  
 " pay to the pursuer, the one half of the free proceeds of  
 " all the said coals raised, or to be raised, in terms of  
 " the clause of the lease, and contract before recited, re-  
 " specting any consideration received for communicating the  
 " said level, with the pursuer's consent, to any neighbouring  
 " heritor, together with legal interest of the said free pro-  
 " ceeds, from the respective periods when the same were  
 " received by the said John M'Dowall, Sir Archibald Hope,  
 " John Wauchope," &c.

The Earl of Abercorn also brought an action against Sir Archibald Hope, Captain M'Dowall, the present appellant Andrew Wauchope, John Wauchope, and Francis Charteris —stating his Lordship's lease to Biggar now vested in Sir Archibald Hope; and "that, in opposition to the covenants " therein, Sir Archibald was proceeding to communicate the " level to the Edmonstone and Woolmet coal, without offer- " ing to make any previous reference for ascertaining the con- " sideration to be given the Earl, for consenting to such com- " munication, or making any agreement known to him, for " restraining further communication without his consent," and, therefore, that the defendants should be decreed to de- liver to the Earl the tenth part of all the coals, stone, min- erals, or other things, wrought, or that should be wrought, by means of the said level.

The appellant having found it necessary to make two downsets in different seams of his coal, for preventing the water flowing from the upper collieries and drowning his colliery, the respondent, Sir Archibald, thought fit to chal- lenge these operations by a suspension, contending that the Niddry coal, being the inferior tenement, was subject to a natural servitude of receiving the water that came down from the higher coal of Woolmet.

All these actions, after various reports of miners, &c., were

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reported by the Lord Ordinary to the Court, who conjoined the processes brought at the pursuer's instance against the Earl of Abercorn, and the other defenders, with this process, appointed parties to give in memorials, and appointed John Saunders, coal surveyor at Airth, to make a plan of the different seams of coal.

The appellant maintained four questions.

1. The recompense he was entitled to from Sir Archibald Hope, for his having communicated the level without the appellant's consent.

2. Whether Sir Archibald, as come in place of Biggar, was obliged to procure from Lord Abercorn a perpetual right to the communication of the Duddingstone level to the Niddry coal, in terms of Biggar's lease with the appellant?

3. Whether the level was effectually shut up?

4. Whether the appellant had not right to make downsets in his own ground, and fill them up with clay, or other materials, for preventing the water flowing from the upper collieries and drowning his coal?

June 26, 1778. The Court pronounced this interlocutor, "The Lords find, " that the level communicated to the lands of Niddry, by Mr. Biggar, in right of his lease from Lord Abercorn, and in implement of his obligation to Niddry, contained in the lease betwixt Niddry and him, stands secured to Niddry, for the purpose of working the coal within the lands of Niddry, and that Lord Abercorn has no power to shut up that level, to the prejudice of Niddry's coal; but find, that the communication of the level, as covenanted in the lease betwixt Niddry and Mr. Biggar, is, and stands limited by an express provision, that it should not be in the power of Niddry to carry on that communication to the coal works of any neighbouring heritor, without the consent of Mr. Biggar. Find that this negative is now vested in Sir Archibald Hope, and must remain with him and his heirs, succeeding in Biggar's right, to the effect of restraining Niddry from opening and communicating the level to the coal works of any of the adjacent heritors, to the further prejudice of Lord Abercorn's original property; and therefore find that the recompense due to Lord Abercorn, by Sir Archibald Hope, must be limited to the benefit which has accrued, or hereafter may accrue, to the coal of Niddry, by the communication of the said level, and to the benefit which has accrued to the coals of Edmonstone and Woolmet, from the time the said level was opened, to the time

" it was shut ; and find that Niddry can only be entitled to  
" a share of the recompense due for the communication of  
" the level to the coals of Edmonstone and Woolmet, during  
" the time foresaid, and must concur with Lord Abercorn in  
" drawing the same in such proportions as shall be ascertained  
" by the Court : and find, that whenever, and how soon Sir  
" Archibald and his heirs, shall be discharged of all further  
" claim of recompense, his negative against opening and  
" communicating said level to the other heritors shall cease,  
" and thereafter the level shall become the joint property  
" of the Earl of Abercorn and of Niddry, subject to their  
" disposal by joint consent. Further, the Lords find, that the  
" level formerly opened by Sir Archibald Hope, from the  
" lands of Niddry, into the superior lands of Edmonstone  
" and Woolmet, was effectually shut up by Sir Archibald  
" Hope, upon the and continues so at this  
" time, and that the same must be kept so shut up, at the  
" expense of the said Sir Archibald Hope ; and also find,  
" that Mr. Wauchope of Niddry cannot make the downsets  
" complained of by Sir Archibald Hope, upon any of the seams  
" of coal within his lands of Niddry, so as to prevent the  
" natural passage of the water through those seams in its  
" present course, and thereby occasion a reflux or stagna-  
" tion of the water, upon the property and coal of the supe-  
" rior lands of Edmonstone and Woolmet : and find, that  
" the recompense claimed by Lord Abercorn and Niddry,  
" for and upon account of the communication of the level,  
" and of the webs of coal which have been wrought, and may  
" be wrought in the lands of Niddry, and which have been  
" wrought in the lands of Edmonstone and Woolmet by that  
" level, cannot exceed the expense of these webs of coal,  
" might have been wrought by one or more engines in the  
" original state of these coals, and supposing the level had  
" never been communicated out of the lands of Dudding-  
" stone: and in order to ascertain the expense of such engines,  
" remit to Messrs Smeaton and Watt, engineers,  
" and either of them, to report to the Court an estimate of  
" the expense of erecting an engine upon the lands of Niddry  
" in the year 1748, before the level was communicated, suf-  
" ficient to work the coal of Niddry, to the depth of the sea  
" level, and also the annual expense of maintaining such  
" machine to the present time, and in time coming; and also  
" the expense of erecting an engine upon the lands of Ed-  
" monstone or Woolmet, in the year before the level was  
" communicated to these lands, sufficient to work the coal

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" of Edmonstone and Woolmet to the depth of the sea level,  
" and also expense of maintaining said engine, from the said  
" year , when the level was communicated to Woolmet,  
" to the year , when it was shut, and what would be  
" the value of said engine at the time of shutting up said  
" level; reserving to the Court to determine, when such re-  
" port shall be made, what part of said expense shall be paid  
" by Sir Archibald Hope, as recompense for communication  
" of said level to the respective coals aforesaid, and also to  
" determine in what proportions the sum so to be paid shall  
" be drawn by Lord Abercorn and Niddry."

All parties having reclaimed against such parts of the above interlocutor as they conceived to be against them;

Jan. 19, 1779. Whereupon the Court pronounced this interlocutor: "Before

" answer to Earl of Abercorn's petition, remit to Messrs.  
" Smeaton and Watt, and either of them, to report to the  
" Court, along with the estimate formerly ordered, an esti-  
" mate of the expense of erecting and upholding an engine  
" of sufficient power to raise the water from the depth of  
" the sea level to the earth's surface, during the time of  
" working the coal in Niddry ground, below level as well as  
" above; and also to report any further facts that either of  
" the parties may think material: Find the petitioner, An-  
" drew Wauchope of Niddry, is entitled to make downsets  
" in the seams of coal in his own ground, and to fill up the  
" same with clay, stone, or other materials, so as effectually  
" to prevent the water from coming down upon his coal  
" from the coal of Edmonstone and Woolmet, and, with those  
" variations, adhere to the former interlocutor, and refuse  
" the desire of all the petitions."

The appellant appealed from the first interlocutor of 26th June 1778; and also from that of 19th Jan. 1779; and particularly from such parts of both interlocutors as authorise and order a remit to Smeaton and Watt, or either of them, for the report upon the sundry points therein stated.

The Earl of Abercorn also brought a cross appeal, complaining of the said interlocutors in several particulars.\*

*Pleaded for the Appellant, Mr. Wauchope.*—By your Lordships' judgment of 20th April 1774, the quantum of the appellant's recompense for the wrongful communication, was to be proportioned to such benefit as, under all the circumstances,

\* Sir Archibald Hope did not present any cross appeal against that part of the interlocutor, entitling Mr. Wauchope to make the downsets, to prevent the water flowing from the higher colliery to his inferior tenement; but acquiesced in that judgment.

the then respondents had received from such communication. This rule is plain and simple, and easily complied with. But the Court of Session has, by these interlocutors, determined it a wrong one, and instead thereof, has said that the recompense to be made to the appellant cannot exceed the expense at which the same webs of coal *might* have been wrought in another and cheaper manner, if such could be devised, and, therefore, referred it to two engineers to discover whether, and in what manner these coals could have been wrought cheaper; and in order to puzzle the matter still more, has desired them to direct their attention, and apply their calculations to the year 1748, plainly intimating that the result of the inquiry shall be the rule of any future judgment ascertaining the *quantum* of the appellant's recompense. The appellant, on the other hand, desires to adhere to your Lordships' rule: and that in such manner as the respondent, Sir Archibald Hope, himself cannot object to, being willing to ascertain his demand from Sir Archibald's own books of accounts of the working and sale of these coals. These books of accounts are exhibited in this suit, and by them it appears, that from the 25th of September 1765, when the communication of the level was made, to 24th October 1774, when it was shut, but not effectually, the value of the coals taken out and sold amounted to £40,707. 8s. 2d. The one half of which sum, after deducting all necessary expenses, the appellant claims as his recompense and compensation; and insists that he is entitled to a further compensation for the coals worked by Sir Archibald Hope, and by Mr. Wauchope of Edmonstone, and that they shall be obliged to produce their accounts, from the said 24th October 1774, until such time as the level shall be effectually shut up. The rule prescribed by the Court of Session is inextricable. First, It is a disputed point, and must be proved, whether, at the time the level was communicated, it was possible to have drained the Woolmet coal to the depth of the sea level. Secondly, Supposing that possible, all the accidents and chances attending a fire engine, but which never can happen in working by a level, must be taken into computation. The many repairs and failures in the machinery, which stop the work, and throw the colliers and miners idle for days and weeks together, with many other necessary circumstances, must all be ascertained, before the Court can justly determine how far Sir Archibald Hope has been a gainer by the use of the appellant's level. Besides, the principle itself, upon which the

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rule of the Court of Session is endeavoured to be grounded, is erroneous and unfair—for if a person seizes and uses the property of another without his consent, justice entitles the true owner to all that *de facto* has been produced to, or gained by the wrong doer, during his wrongful possession; and it is no answer to this to say, that the Woolmet possessor might have made an equal profit by the use of some other thing which belonged to himself, or which he might have purchased at a cheaper rate, when he seized his neighbour's property. Further, the decreeing that the appellant is only entitled to a share of the recompense, for the communication of the level to the coals of Edmonstone and Woolmet, "from the time it was opened till the time it was shut," "and that he must concur with Lord Abercorn, in drawing "the same in such proportions as shall be ascertained by the "Court," is unwarrantable and erroneous. By your Lordships' two determinations, it is established that the appellant has the sole property of the level, within his own estate, and the sole right to prevent or allow its communication; that it was illegally communicated by the respondent, Sir Archibald Hope; and that the appellant was entitled to satisfaction for such illegal communication. Here is not the least allusion to any claim of recompense of the Earl of Abercorn, nor could there be, as he was not before the Court below, nor before your Lordships; and your Lordships' order as to making him a party to the then suit, or instituting a new one, relates only to the communication of the Duddingstone level by Biggar to the Niddry coal. The appellant apprehends that he is now entitled to the same consideration he would have had a right to demand, in case he had previously consented to the communication of the level to Woolmet coal, in which case, he would certainly never have consented to a division of such recompense with Lord Abercorn, or any other person whatsoever; and this goes as well to the recompense, or share of the profits, of all the coal that has been, or shall be wrought in the estates of Edmonstone and Woolmet, by means of the communication of the level since, as before the level was shut up in the Gillespie seam. In point of fact, the level was not communicated to the Niddry coal from lands which, at the time, belonged to Lord Abercorn, but from the lands of *Brunstane*, then the property of Lord Milton, who had then the only right to challenge Biggar for such communication. Long after the level was so communicated through Lord Milton's estate of Brunstane to the Niddry coal, the Earl of Abercorn pur-

chased that estate from Lord Milton's heirs, with full knowledge of the level being open and communicated to the Niddry coal; and, therefore, the appellant having thus acquired absolute right to the level, before the Earl of Abercorn's purchase of the Brunstane estate, the Earl is not entitled to any recompense or satisfaction for the communication of that level from the appellant's into neighbouring heritors grounds. Moreover, from the covenant in Biggar's lease with Lord Abercorn, it is beyond all question clear that Biggar had a right to communicate the Duddingstone level to the grounds of any neighbouring heritor; he was at liberty so to do, without any previous consent asked or given by Lord Abercorn. The only condition was, that for such communication Biggar should pay to his Lordship a consideration, to be settled by arbitrators. But, in the present case, the appellant does not derive the benefit of the level directly from Lord Abercorn, but from the then proprietor of the estate of Brunstane. How that proprietor, viz. Lord Milton, acquired a right in the level so many years ago it is not the appellant's business to investigate. The covenant, therefore, requiring *Biggar* to obtain Lord Abercorn's consent, was only in the event of the level being communicated from Lord Abercorn to the appellant's collieries directly; nor does it seem even then to be absolutely necessary; but as that level was made in a different direction, by which he derived it from Lord Milton, whose estate Lord Abercorn has since purchased, the appellant humbly apprehends he has no privity or connection whatsoever with the Earl of Abercorn, either as to a present division of the recompense, or so as to give his Lordship a control on his use of the level hereafter.

The interlocutors find, that the level was effectually shut up by the respondent Sir Archibald Hope, and continues so, though from the proofs the contrary appears, as at this moment coal is wrought at the Woolmet and Edmonstone lands level free, which formerly used to be covered with water; and the manner in which the work has been performed gives little hopes of its long continuing even in its present state. It appears by the depositions of witnesses that a greater quantity of water now comes down upon the Niddry coal, especially through the stair head and great seams, than there did before the level was communicated: and this made it necessary for the appellant to make the downsets in his own lands.

*Plead ed for the Earl of Abercorn.—Every extension of*

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the Duddingston level to other collieries, without the consent of the Earl of Abercorn, is injurious to his property in the said level, unreasonable, and cannot be supported even by the agreement made between the appellant Mr. Wauchope and Mr. Biggar. 2. Because the giving to the Earl of Abercorn a negative against opening and communicating the said level to other heritors, and making the said level subject to the joint disposal of his Lordship and the appellant Mr. Wauchope, is the only means left to his Lordship of protecting his collieries from being made the common sewer of the whole county, or securing to his Lordship some compensation for that servitude. 3. For that a contrary decision would not only preclude his Lordship from making any advantage of the valuable situation of his property, but would enable the appellant Mr. Wauchope, under a strained construction of one clause in his lease to Mr. Biggar, to engross to himself all the advantages arising from the communication of this level to the collieries, and would, at the same time, be contrary to another express clause in the said lease, whereby the appellant Mr. Wauchope is prohibited from making any communication of the said level without the consent of Mr. Biggar.

The Earl of Abercorn's appeal was therefore brought, 1. In so far as the Court below did not find him entitled to a consideration for the levels being communicated to the Brunstane, in the same way as to Niddry. 2. In so far as they find that the *quantum* of the recompence ought to be determined, not according to a reasonable proportion of the coals wrought, or which may be wrought, by means of the level, but by an uncertain valuation, taken from the supposed difference between working by a fire engine and working by a level. 3. In so far as they find the Earl of Abercorn entitled only to a part of the supposed difference between working by a level and by fire engines. 4. By not determining, before the remit to Messrs. Smeaton and Watt, the proportions of the recompence which ought to be made to the several parties. The Earl maintains that Biggar communicated the level to the coal of Brunstane without any application to, or agreement with him. The mode also of ascertaining the recompence must be uncertain and erroneous, as directed by the interlocutors complained of: while, on the other hand, no sufficient reason is assigned why the Earl ought not to be entitled to the whole consideration payable for the communication of the level.

*Pleaded for Sir Archibald\* Hope.—As to Mr. Wauchope's*

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\* This is printed Sir John by mistake in the title of this appeal.

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original appeal.—As the communication of the level did not proceed from any wrongful act of the respondent; but was made in consequence of an order of the Lord President, acting as arbitrator, the respondent is only bound in justice to make satisfaction for the temporary use of the level, in proportion to the benefit actually received from it, agreeably to what is declared by your Lordships' judgment of the 19th April 1774; but this benefit, it is clear, cannot possibly exceed what it would have cost the respondent to erect and uphold an engine of sufficient power to drain the water as effectually as was done by the level: and, in order to determine the exact amount of such expense, the only evidence that could be resorted to, was the opinion of persons most experienced and conversant in works of that kind; so that the remit to Messrs. Smeaton and Watt was both proper and necessary. 2. The rule contended for by Mr. Wauchope, of fixing the recompence at a half of the profit made on the whole of the coal wrought in the lands of Woolmet during the time that the communication subsisted, is both unreasonable and a direct contradiction to the former judgment of your Lordships. It is thereby declared, that the respondents are liable "to make the appellant such satisfaction as " shall be just and reasonable, under all the circumstances, " for the benefit they have enjoyed, if any, by reason of the " opening and communication of the said level;" whereas the appellant Mr. Wauchope is insisting, that without inquiring whether any, or what benefit has arisen from the communication of the level, or into any of the circumstances of the case, the respondent shall be found liable in a large proportion of the coal raised by him whilst the level was open; the whole of which could have been wrought by an engine, and the greatest part of it without an engine, or the assistance of the level. 3. It is proved that the level has been shut up in the most effectual manner, and thereby the judgment of the 19th April 1774 complied with, so that no complaint lies on that head. 4. As to procuring the consent from the Earl of Abercorn, to a perpetual communication of the level through the lands of Duddingstone to the coal of Niddry, the respondent does not conceive that any such obligation is incumbent upon him. No mention is made in the lease of a perpetual communication. Mr. Biggar only became bound to procure Lord Abercorn's consent to communicate the level to the Niddry coal, and this has accordingly been done. The clause in Mr. Biggar's lease with the ap-

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pellant Mr. Wauchope in 1748 proceeds upon the recital of the previous contract entered into between Lord Abercorn, respecting the communication of the level; and the appellant, knowing the nature of Mr. Biggar's right, could never expect to acquire a better right than Mr. Biggar himself was possessed of; and the right Mr. Biggar acquired by that contract is now fully vested in the appellant. But neither Mr. Biggar nor the respondent became bound to warrant the perpetuity of that communication. 5. The appellant Mr. Wauchope's new plea, which he has lately made, to have it found that he is entitled to extend the communication of the level beyond the lands of Niddry, and that the negative against his so doing without the respondent's consent, was not binding after the expiry of the lease, is directly contradictory of what he has all along maintained, and even to the judgment of your Lordships 28th January 1773. On the contrary, he founded on the expired lease as his title to have the level shut up.

In regard to the Earl of Abercorn's cross appeal, 1. Any further extension of the level can only be made by Mr. Wauchope, within whose property it has been effectually shut up; and as the respondent, in right of Mr. Biggar, and by terms of his lease, has a title to restrain Mr. Wauchope from again opening the communication, (the benefit of which negative is declared to be invested in the Earl), consequently the Earl's claim to recompense can only be for the communication already made; and the respondent can be liable to no more than a consideration for the communication of the level to the coal of Niddry, and the temporary use thereof enjoyed with respect to the coal of Woolmet. 2. By the appellant the Earl of Abercorn's letter of 3d October 1748, it was declared that the consideration payable by Mr. Biggar, instead of being settled by arbitrators before the work commenced, as originally proposed, should depend upon success of the undertaking, and be settled at a reasonable share of the profit arising from it. In which view of the case, the benefit derived from the communication of the level can never be more than the saving or difference of expense in working the coals of Niddry and Woolmet with the use of the level, and employing machinery to draw the water. And, in order to ascertain this expense, the Court of Session have adopted the only species of evidence which the nature of the thing can admit of, viz. a remit to two persons of skill and extensive experience in works of that

kind. 3. The rule contended for by the Earl of Abercorn to fix the recompense at a tenth of the gross produce of all the coal wrought in the lands of Niddry and in the lands of Woolmet, during the time that the level continued open, is not founded in any practice in Scotland, so far as the respondent has been able to learn, and is in direct contradiction to the rule laid down by your Lordships for ascertaining the recompense to Mr. Wauchope, and to the letter above mentioned. 4. It is not pretended that the carrying the level into the Gillespie seam has occasioned the least damage to the Earl of Abercorn; on the contrary, as is proved by those who examined and reported on the works, it has proved of considerable advantage to the Earl's own coal of Duddingstone.

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After hearing counsel,

LORD MANSFIELD,

" Previous to making the motion, remitting this cause, entered into a long and circumstantial recapitulation, not only of the original grounds of litigation between the parties, but of the several stages of legal process through which the cause had passed, previous to its having been brought before their Lordships in this last appeal. His Lordship said:—" The whole litigation originated in a lease, or tack (as it is called in Scotland), of the lands of Duddingstone, granted by the Earl of Abercorn in 1743 to John Biggar, who was now represented by Sir Archibald Hope, the respondent. (He then described the geographical situation of the lands of Duddingstone, Woolmet, Niddry, and Brunstane, which lie south and north, in a gentle descent from the most southern part into the sea northwards,) and pointing out whence the Earl of Abercorn's property is affected by the collieries worked in these lands, what the nature of the Earl's claim was, and what the nature of the claim made by Andrew Wauchope of Niddry, Esq., as well as the defence and grounds of answer to each of these claims, on which the case of the respondent, Sir Archibald Hope, rested. He then described the previous litigation, terminating in a former appeal, noticing each interlocutor that had from time to time been pronounced, and pressing upon the notice of the House wherein these interlocutors were inconclusive in respect to the parties, or inconsistent with each other, and deducing from the whole, the propriety of remitting the cause for the reconsideration of the Court, so as to clear it from ambiguity and doubt."

" As an additional reason for remitting, his Lordship laid great stress on the lease of the lands of Duddingstone, which the respondent, Sir Archibald Hope, held (as the representative of Biggar,)

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from the Earl of Abercorn, being to expire in May, which would give the whole matter, as far as it regarded the Earl's claim, and the answer of Sir Archibald Hope, a new turn. He also said, it was absurd to suppose, and he was a little astounded at having heard it seriously argued, that if it were established that a party was bound to pay and satisfy a specific claim for damages sustained, by his having, in the exercise of a right which was granted him to a certain degree, gone further than the right really extended, from a misconception of its extent, that the party was obliged to pay the same claim to two parties, because, in that case, the party to pay would pay double the sum he was bound to discharge."

" His Lordship very obviously proved, that the House could not, as the case then stood, give a judgment upon the appeal, without violating their established rule, of never deciding in the first instance, on what had not before been decided, upon in any of the Courts below, without deciding upon some parts of the case which were not then in appeal from either of the interlocutors complained of, nor without sending the cause from their bar, as far at least, from an ultimate adjustment of the claims, and a satisfactory accommodation of the parties, as when they first appealed from the Court of Session; all which difficulties, he conceived their Lordships would wish to avoid :"\*

It was therefore ordered and adjudged,

" That the said causes and process be remitted to the Court of Session in Scotland, with liberty to each party to reclaim and amend the process, as he shall be advised. And more particularly, to enquire and find how many, and what communications of the Duddingstone level have been made or granted, at any, and what time respectively, to any, and which of the neighbouring lands, and for how long time have been kept open and used, in fact; and for what terms respectively the same, or any of them have or must continue open of right, and in whom respectively the right of keeping open such communications are vested; at what time or times respectfully, it will or may be competent for the appellant, the Earl of Abercorn, or his heirs, to shut up the same, or any and which of them respectively; and, if it should be found that any of the said communications must be kept open for any future term, so that the said Earl of Abercorn, or his heirs, shall not be at liberty to shut the same up during such term, then, and in that case, to ascertain the value of such servitude or servitudes respectively; and for the time past to enquire and find what benefit hath been derived from the use of the level in question, in unwatering or raising of coals or otherwise, in any other lands than those of Duddingstone; and when such level passing through the lands of both the appellants, had been so used for unwatering or raising of coals, or otherwise, in any lands lying above, or to the

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\* From a note written to the Edinburgh Solicitor of what passed at the hearing.

" south, or south-west of Niddry, to apportion the value of the benefit  
 " arising therefrom, between the said appellants, according to the local  
 " situation and other circumstances of such lands respectively."

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For Appellant, Mr. Wauchope, *James Wallace, Ar. Macdonald.*

For Earl of Abercorn, Appellant in Cross Appeal,  
 and Respondent in Original Appeal, *Al. Wedderburn,  
 Thos. Erskine.*

For Respondent, Sir Archibald Hope, *Henry Dundas, J. Dunning.*

One point in this case, viz. " Servitude," is reported M. 14538.

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(M. 15530.)

DAVID ORME, Writer in Edinburgh, - *Appellant.*  
 JOHN LESLIE of Balquhain, Esq. - *Respondent.*

House of Lords, 25th February 1780.

**ENTAIL—LEASES—ALIENATION.**—How far leases for four nineteen years' duration of an entailed estate were reducible as an "alienation" thereof. Leases sustained, in the special circumstances, for the grantor's life, and the life of the heir who ratified them ; but a lease of a mansion house, offices, and gardens, &c. reduced, and also of the lands beyond the lifetime of these parties.

This is the sequel of the case between Counts Leslie and Leslie Grant, which, after five appeals to the House of Lords, ended in favour of the latter, finding him entitled to succeed to the entailed estates in Scotland of Balquhain and Mains, and of Fetternear. The entail of the estates originally contained a prohibition against leases in diminution of the true worth and rental of the estates ; but by a second entail this restriction was taken away ; and the only prohibitions in this entail were directed against selling, alienating, or disponing, or doing any other deed in prejudice thereof ; and the question here was, whether long leases were to be held as alienations of the estate ?

In the whole litigations which took place in the former cause, the appellant acted as agent for Leslie Grant, and an account being incurred to him in conducting the cases before the Court of Session and House of Lords, amounting to £3240, Grant executed six several deeds, having the effect of

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granting him leases of the whole estates of Balquhain and Fetternear for four nineteen years, including house, gardens, &c. &c. The first lease of 1765 was superseded by one more simple in 1769. This was followed by an assignment of the surplus rents, after deducting £300 payable to himself, to which sum he restricted his right as tack duty by deed 1769. This latter assignment was ratified by the next succeeding heir of entail, Mr. Patrick Duguid, in September of the same year, which was called the fourth deed. The fifth deed was the lease of the houses, gardens, &c. of Fetternear in 1773, and thereafter on the 11th of September of that year, a prorogation of the term of the lease was granted by the sixth deed for 19 years.

After Mr. Leslie Grant's death, and notwithstanding the above ratification by the next succeeding heir Mr. Duguid, the latter raised a reduction of the whole leases, as well as assignment and restriction, and of his own ratification thereof, (which, after his death, was carried on by the respondent, as next heir of entail), on the ground, 1. That they were unfair transactions, wherein an undue advantage was taken of Mr. Leslie Grant's situation with reference to the appellant and other creditors; 2. That it was not in his power, as heir of entail, to grant the leases in question, which, when looking only to the second entail, was inferred from the prohibition to *sell, annalzie, or dispone, or to do any other deed.* 3. That, at any rate, the heir of entail could not legally dispose of in this manner the house, offices, and gardens of Fetternear. 4. That the deed of assignment of the rents to the appellant for himself, and in trust for Leslie Grant's other creditors, and restriction of the tack duty, should be set aside, it not being in his power to grant such beyond endurance of his own life.

Mar. 3, 1779. The Court, of this date, pronounced this interlocutor,

" They adhere to that part of the Lord Ordinary's interlocutor which finds that the insisting in a reduction of the tack, dated the 5th of April 1765, was inept and incompetent, and asoilzieing the defender from that conclusion of the pursuer's summons; repel the reasons of reduction of the tack granted by Peter Leslie Grant to the said David Orme, dated the 29th of March 1769; repel the reasons of reduction to the obligation and assignation, dated the 29th of March 1769, in so far as respects the restriction of the tack duty and assignment of the surplus over and above the £3600, during the lifetime of the said

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" Peter Leslie Grant, and of the pursuer's father; but sustain the reasons of reduction thereof so far as regards the restriction and assignment of the tack duty, of all years from and after the death of the pursuer's father. Repel the reasons of reduction of the ratification of the pursuer's father, in so far as regards the tack itself and the restriction of the tack duty and assignment of the surplus thereof, for the purposes therein mentioned, during the lifetime of the pursuer's father, after his succession to the estate of Balquhain; but sustain the reasons of reduction *quoad ultra*: Sustain the reasons of reduction of the deed of restriction granted by the said Peter Leslie Grant to the said David Orme, dated the 5th day of August 1769 years, and of the said tack and deed of restriction granted by the said Peter Leslie Grant to the said David Orme, dated the 11th of September 1773, and remit to the Lord Ordinary to proceed accordingly, and further to do as he shall see just."

Against this interlocutor the appellant brought an appeal to the House of Lords, in so far as it reduced the third deed of assignment and restriction; and in so far as it sustains the reasons of reduction of the deed restricting the tack duty and assignment of the surplus rents above the £3600, *after the death of the respondent's father*; and in so far as it sustains the reasons of reduction of the deed dated the 5th August 1769; and the tack and deed of restriction dated the 7th September 1773; and of the tack dated the 11th September 1773 appealed therefrom to your Lordships. The respondent brought a cross appeal against the part of the interlocutor adverse to him.

*Pleaded for the Appellant.*—An heir of entail, it is settled law, may exercise every act of ownership, not expressly prohibited by the entail. Leases were not expressly prohibited, and consequently the heir of entail had full power to grant leases of the estate. No restriction can be inferred in this respect from a prohibition against selling or doing any other deed to affect the other heirs of entail. No objection lies to the leases as to the power of granting them; and the question is, what other ground exists for reducing? There is no fraud or circumvention, and there is an object and an onerous cause as the groundwork of the whole. The fairness of the transaction is unimpeachable, the object wished to be attained by the deeds was openly avowed, namely, the clearing off the debts contracted to the appellant and others.

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And as these costs were expended *in rem versam* of the whole heirs of entail of the estate of Balquhain, the leases ought to be good not only for the lifetime of Mr. Leslie Grant, and Mr. Duguid, who ratified them, but also during the lifetime of the succeeding heirs, until the leases are expired, or the debt paid. Nor is this power of granting leases confined to the lands alone. It is equally competent in regard to the mansion-house or seat of the family, because there is no law prohibiting an heir of entail, unfettered as to leases, from granting a lease of the mansion houses, offices, and gardens. The Court has found these leases reducible, as well as the mains or farm adjoining the house, but this is not supported by any ground in the law whatever.

*Pleaded for the Respondent.*—The original object of the lease to the appellant was to secure him in payment of his account, yet this was rather an unusual security to take, and there was one more regular, and equally secure and open to him, in so far as his payment was concerned; but this did not exactly suit his views. He got a lease, and entire possession of the estate; and by degrees he extended his views, and carried them into execution by a series of deeds. Besides, at the time the transaction was entered into, Mr. Orme understated, concealed, and misrepresented the real grassums payable by the several tenants, so as to affect the terms of the bargain in his favour. These 'deeds were to the great injury and lesion of Mr. Grant, and to the injury of the succeeding heirs, as they gave to the appellant this very considerable estate, for nearly one hundred years, on payment of a very trifling amount to the true owner.—The multiplicity of the deeds themselves—the grasping at the whole rents and even casualties of the estate, as well as the mansion house, stamp the true character upon them, and shewed a determination on the part of the lessee, to enjoy the property of the whole estate. Separately, There is reasonable ground for maintaining that the original entail, expressly prohibiting leases, remained in full force. At all events, if otherwise, the second entail, prohibiting to *sell, alienate, or dispone, or do any other act or deed,* was sufficient to prohibit leases such as the present, by which the entire estate was transferred from the proprietors for a 100 years, because such a lease was equivalent to an alienation. It was, besides, express against contracting debt, “by which the same might be evicted, apprized, or adjudged,” and therefore Mr. Leslie Grant had no right or power by the entail to charge a six-

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pence of debt either upon the lands, or upon the rents, for longer than his own lifetime, and though this debt was contracted in conducting the law suits in question, yet there is no legal obligation upon the respondent to pay the same.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed.

For Appellant, *Al. Wedderburn, Dav. Rae.*

For Respondent, *Henry Dundas, Ar. Macdonald.*

NOTE.—The grounds of the judgment in this case, are explained by Lord Chancellor Eldon, in the Queensberry Leases, Dow, vol. ii. p. 112.

[M. 4277.]

ELIZABETH, MARGARET, and HARIET GRAHAM, }  
Infant Children of William Graham of } Appellants;  
Gartmore, - - - - - }  
MARGARET GRAHAM, Mother of the said Child- } Respondents.  
ren, and ALEXANDER GREIG, her Trustee, }

House of Lords, 17th March 1780.

**FIAR-FEE OR LIFERENT.**—Circumstances in which the terms of a destination to a parent in liferent, and to “*the heirs of her body in fee,*” held, to give the mother a fee and absolute right to the personal estate conveyed.

Dr. Porterfield, the respondent’s father, assigned and transferred “to and in favour of the said Margaret Porterfield, my daughter, *in liferent*, and to the heirs of her body *in fee*; whom failing, my own nearest heirs and assignees “whatsoever, the several bonds and sums of money herein “after mentioned.” Here followed the enumeration of the “bonds. There was a declaration that “these presents are “granted by me, and to be accepted by the said Margaret “Porterfield, with the burdens of all my just and lawful debts, “legacies, funeral charges and expenses. With full power “to my said daughter, and *her foresaids*, for their respective “interests above mentioned, after my decease, to uplift and “receive the foresaid sums of money, and, if need be, to sue “therefor, and to grant discharges of the same, which

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**GRAHAM, &c.** " shall be sufficient to the receivers, and generally to do  
 " every other thing in the premises which I could have  
 " done in my life." " And I hereby reserve full power to  
 " me, to innovate and alter these presents, by a writing  
 " under my hand, at any time in my life, and even at the  
 " point of death, or to cancel the same as I shall think pro-  
 " per, declaring that these presents shall be effectual, in so  
 " far as not altered by me."

His daughter, Margaret Porterfield, had married Mr. Graham of Gartmore, and, at the time the above disposition was made, their eldest child Elizabeth was born; the other two were born before his death. Having died, of this date, the question which arose in the present case was, Whether, by the above disposition, there was an absolute right of property conveyed to Mrs. Graham, or merely a liferent.

**June 25, 1779.** The Court of Session, of this date, pronounced this judgment, " On report of Lord Kaimes, and having advised the informations of both parties, the Lords find, That the fee " of the bond in question is vested in Mrs. Graham, the " mother (respondent), and remit to the Ordinary to pro- " ceed accordingly."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellants.*—The deed in question is in the nature of a will, or testamentary disposition, taking effect only at the testator's death. The intent, even where not so clearly appearing as in the present case, must prevail, if not introducing a new kind of estate, or new mode of property, not allowed by law. But here, both words and intent make it manifest that the respondent was to have these bonds for her life only, and the principal, after her death, to go to her children absolutely. The three appellants, her children, were in being at their grandfather's death, when his disposition took place; and, consequently, the property of these bonds vested instantly in them, subject to their mother's life interest therein. So that however inapplicable the judgments upon limitations of real estates are to questions arising upon mere personality, yet, had this been a disposition even of a land estate, ther'd would not have been a colour for enlarging the liferent into a fee, because the fee would have vested immediately in the appellants. 2d, The respondent's objection, of an inconsistency between her taking only a life interest in these bonds, and yet being charged with the payment of debts, legacies, and funerals, is falla-

cious and totally groundless. The deed expressly sets out by assigning and transferring, with and under the burdens herein after inserted, to Margaret his daughter, in life-rent, and to the heirs of her body in fee; so that the burdens affect the several interests given to mother and children; none of whom, till those burdens are discharged, can take any benefit from the disposition. The declaration at the end of the deeds, of the gift being made by the grantor, and accepted by the respondent, with burden of payment of his debts, legacies, and funeral expenses, specifies the burdens above mentioned, and has afforded the respondent this notable objection, which could never have been thought of, had the debts, legacies, and funeral been particularly mentioned at the beginning of the deed, as the burdens whereto the whole gift was subjected. But this inaccuracy, if it be one, cannot vary the priority of the charge, expressly laid by Dr. Porterfield, upon the whole effects he was then disposing of, nor enlarge by a forced and unnatural construction, the *life interest* expressly given her; and this for the purpose only of enabling her to strip her children, contrary to their grandfather's apparent intent, of the interest conveyed to them. 3d, And by the decisions in the Court, in similar destinations, it is established that there is a fee in the children, and a life-rent only in the parent.

*Pleaded for the Respondents.*—The assignment upon the construction whereof the present question arises, being a deed of a testamentary nature, great regard is due to what thereby appears to have been the testator's intention. The testator's meaning manifestly was, to give his whole fortune to his daughter, the respondent, to be at her absolute disposal; and that the mention of her heirs is mere words of superfluity, or intended to operate only in the case of her predeceasing the testator. The state of the respondent's family, at the date of the assignment, shows that her child or children, could not be the particular objects of the testator's affection. Had he meant to restrain her from taking more than the growing interest of his fortune, he would have used terms less equivocal; and, by creating a trust, or in some other shape, have preserved the right of the children during her life, at the same time that he provided for the management of the fund; but, in place of this obvious course, he empowers his daughter to levy and receive the whole monies assigned; for though the power is given to her and her foresaids, for their respective interests, the particle and

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is here evidently the same with *or*, as if it had been expressed to his daughter, or the heirs of her body, according as the right shall be vested at the time. Another circumstance seemingly demonstrative of the testator's meaning, is the burdening the respondent *alone* with the payment of *his legacies*, funeral charges, and debts, which amounted to more than her *liferent* could possibly be worth; and the intention is further explained, by no distinction being made between the arrears of interest due upon the bonds at the testator's death, and the principal sums and interest to grow due thereafter. 2d, It is an established rule in the law of Scotland, that a conveyance or assignment to a person, and the heirs or children of his body, vests an absolute fee in the parent, and gives no more than a hope of succession to the children; and adjecting the words *in liferent* to the right of the parent, and in fee to that of the children, makes no difference. Were it otherwise, as the granter is divested, and nothing can vest in the children till the death of the parent, the fee or property would be pendent during his life, contrary to the principle, that the fee must always vest in some person existing, or capable of acting. There is, however, no occasion to adopt that principle here, it being sufficient that the law construes it as the meaning of the parties, to vest the fee, notwithstanding the expression, *in liferent*; if no further words of limitation are used; and it is well known, that *liferent*, *allenarly*, or for *liferent use only*, are the terms used by conveyancers, to mark that no more than a bare *liferent* is intended to be given. 3d, It is too late to controvert this doctrine, after being held so long for law, and after the solemn decision in the case of *Frog*,\* and other decisions following it establishing the point.

After hearing counsel, it was  
 Ordered and adjudged that the interlocutors complained  
 of be affirmed.

For Appellants, *Henry Dundas, Al. Forrester.*  
 For Respondents, *Al. Wedderburn, Alex. Wight.*

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\* *Frog v. Frog*, Nov. 25, 1735; Mor. 4262.

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The YORK BUILDINGS COMPANY, and their  
Creditors, - - - - } Appellants;  
JAMES FERGUSON of Pitfour, Esq. - Respondent.

THE YORK  
BUILDINGS CO.  
&c.  
v.  
FERGUSON.

House of Lords, 21st March 1780.

**SALE OF LANDS—WADSET—DECREE OF SALE.**—The York Buildings Company purchased the forfeited estate of the late Earl Marischall, together with the right of redemption of the wadsets and superiorities thereof. There were two wadsets on the lands of Clerkhill and Downieshill, being part of the Marischall estate. The Marischall estate, along with others, was afterwards let on lease to Sir Archibald Grant and Mr. Garden; and were thereafter ordered to be sold by Act of Parliament, as so let on lease. Neither the articles as to the lease, nor the Act of Parliament, mentioned any thing about the wadset lands of Clerkhill and Downieshill, although the prepared state and scheme of the rental included them in the computation of the rental and price at which they were to be exposed. The purchaser insisted that they were included, and ought to go into his charter, as the decree of sale conveyed to him “all and hail the late Earl Marischall’s “lands in the county of Aberdeen, except certain parts therein “mentioned.” Held, that the right of reversion was not included in the sale, and still belonged to the York Buldings Company.

The question here was, Whether the right of reversion of the lands of Clerkhill and Downieshill, which were granted in wadset, belonged to the respondent, the purchaser of part of the estate of Marischall, or to the appellants the York Buildings Company, who sold that estate after they had purchased from the Government the whole forfeited estates, and, among the rest, the estate of the Earl Marischall.

In September 1639, the Earl Marischall had disponed in wadset to Robert Martin, the lands of Clerkhill, redeemable on payment of 6000 merks, (£333. 6s. 8d.) with a lease for the space of seven years, after the redemption at the rent of 11s. 1 $\frac{1}{2}$ d. yearly. There was an obligation to infest.

By another contract of wadset, of this date, the Earl's pre-decessor wadsetted and disponed to Thomas Robertson, the lands of Downieshill, redeemable on payment of 6000 merks, with a back tack for eleven years, on payment of a small elusory rent. There was an obligation to infest in said lands by feu charter, containing precept of sasine, to be holden of the said Earl, his heirs and assignees.

In the sale to the York Buildings Company, the right of

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*v.*

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redemption and superiority of these wadset lands was conveyed. The minute of sale set forth, "Whereas certain parts of the said parcels are in possession of creditors, by virtue of mortgage or proper wadset, which wadssets are redeemable upon payment of the several sums," &c. and then the minute proceeds to convey these. The York Buildings Company estates were sold under Act of Parliament. The estate of Marischall, along with others, was at the time leased by the Company to Sir Archibald Grant and Alexander Garden.

The whole of the Marischall estate was purchased by the late Earl Marischall, who, at sametime, dispossed the 13, 14, and 15 lots to the late Lord Pitfour, the respondent's father, and the decree of sale went out in his name, for the part he purchased. Lord Pitfour thereafter obtained a charter upon the decree of sale 1767. And the present question arose, upon his proposing to include in this charter, the lands of Clerkhill and Downieshill, as a part of the purchased lands. The Barons of Exchequer ordained these lands to be inserted in the charter.

The appellants, therefore, brought the present declarator and reduction before the Court of Session against the possessors of the wadset lands of Clerkhill and Downieshill, to which the respondent sisted himself as a party, and claimed the reversion of these wadssets, as being comprehended in the decree of sale; the appellants also brought a reduction of this decree of sale and declarator of their right to these reversions. The lands in question lay in Aberdeen. The decree of sale was in these words:—"All and haill the lands which belonged to the late Earl Marischall, lying in the parishes of Langside and Old Deer, and salmon fishing of Ugie; and also all and haill the said Earl's lands, lying in the parish of St. Fergus, and county of Banff, and a house in Newburgh, and sicklike; *all and haill the said late Earl's lands in the counties of Aberdeen and Banff, being the haill subjects contained in the three first lots or parcels of the said estate of Marischall, except the lands of Adiel, in the parish of Strichen, and house in Aberdeen; all lying, bounded and described in manner mentioned, in the act of roup, and original and subsequent rights and infestments of the same, to pertain and belong to the said James Ferguson, his heirs and assignees, heritably and irredeemably; and in like manner the said Lords adjudged and decerned and declared, and hereby ad-*

" judged all and haill the said late Earl Marischall's lands  
 " of Dunnotter, Lumgair, Uras, and others, in the county of  
 " Kincardine, with the foresaid lands of Adiel, in the parish  
 " of Strichen, and the foresaid house in Aberdeen, as the  
 " said whole lands and others foresaid, were formerly pos-  
 " sessed by Sir Archibald Grant and Alexander Garden of  
 " Troup, in virtue of a lease thereof from the Governor and  
 " Company of Undertakers for raising the Thames water in  
 " York Buildings, and all lying, bounded and described in  
 " manner mentioned in the act of roup and original and sub-  
 " sequent rights and infestments of the same, to pertain to  
 " the said George Keith, late Earl Marischall, his heirs and  
 " assignees, heritably and irredeemably."

The lands of Clerkhill or Downieshill were not expressly mentioned in the lease to Sir Archibald Grant and Alexander Garden, nor in the act of Parliament authorizing these lands to be sold. They were not also expressly mentioned in the proceedings in the decree of sale. The only evidence adduced of this was, from a state of the rental of these wadsets, and an abstract in which these entered into the calculation of the rental of the late Earl Marischall's lands in the shires of Aberdeen and Banff. From the accountant's scheme and state there appeared the following :—" The ap-  
 " portion falling on the lands which formerly belonged to  
 " the said late Earl Marischall, lying in the counties of Aber-  
 " deen and Banff, formerly wadset, now redeemed by the  
 " Company, £384. 17s. 9d."

The agreement, to give a lease to Sir Archibald Grant and Alexander Garden, bound the company to grant them, their  
 " heirs, executors, and assignees, of the estate of Pitcairn,  
 " and also of the estates of Panmure, Southesk, and Ma-  
 " rischall, excepting from the three last mentioned estates  
 " the following lands, which are already overleased, viz. the  
 " lands of Bellhelvie, part of the estate of Panmure, leased  
 " to Provost Fordyce; the lands of Arnhall, part of the es-  
 " tate of Southesk, and such parts of the lands of Fetteresso  
 " and Dunnotter, being part of the estate of Marischall,  
 " as are leased to Provost Gordon and Provost Stewart;  
 " the lands of Leuchars and Leuchars Forbes, leased to  
 " Professor Gregory; and the lands of Gavel, part of Maris-  
 " chall, leased to George Hay."

The act of Parliament 3 Geo. III. only authorized the sale of such parts of the Company's estates as were leased to Sir Archibald Grant and Mr. Garden.

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THE YORK  
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July 1, 1778.

The appellants contended that neither the act of Parliament nor the agreement in regard to the lease, nor the proceedings in, and decree of sale, comprehended the wadsets in question, while the respondent maintained that they did.

The Court unanimously pronounced this interlocutor:—  
 “On report of Lord Covington, Ordinary, the Lords find,  
 “that the right of reversion of the two wadsets of Clerkhill  
 “and Downieshill, does not fall under the sale of those parts  
 “of the estate of Marischall, sold in virtue of the act of  
 “Parliament of the third of his present Majesty; and that  
 “the defender, Mr. Ferguson, has no right to the reversion  
 “of that wadset; and reduce the decree of sale in favour  
 “of Lord Pitfour, father to the defender, in so far as it may  
 “extend to the said wadset rights, or to the reversions of  
 “these wadsets; find the right of reversion remains in the  
 “York Buildings Company, and remit this cause to the  
 “Lord Ordinary to proceed accordingly.”

On reclaiming note presented by the respondent, the Mar. 3, 1779. Lords pronounced this interlocutor:—“Find that the petitioner has right to the reversion of the two wadsets of Clerkhill and Downieshill; repel the reasons of reduction; assoilzie the petitioner, and decern.”

Against this last interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—The respondent has not proved that the subjects he now claims were comprehended in the act of the 3d of King Geo. III. under which he must derive his title. On the contrary, this act, which directed a *partial* not a *total* sale of the Marischall estate, expressly *confines* the sale to *such parts of that* and other estates as were leased to Sir Archibald Grant and Mr. Garden. The right of reversion of the two wadsets of Downieshill and Clerkhill could not in its nature be the subject of a lease, and was not in fact leased to Sir Archibald Grant and Mr. Garden. The best evidence of this is the depositions of the lessees themselves, and who were men of business, and attentive to their interests, and who have sworn that they were in possession of the whole subjects comprehended in their leases, with certain exceptions which they particularize, but among the exceptions these wadsets do not occur. And they certainly never bargained for these wadset lands, or ever, during the 29 years of their lease, thought of setting up the present claim of the respondent. No power or authority having been given to the Court of Session by the

act of Parliament to sell these rights of reversion, they could not act ministerially in ordering them to be sold. 2. Besides, there is no evidence that the Court had under their consideration, or intended to sell the reversion of Clerkhill and Downieshill. The description in the *prepared state* of the lots supposed to contain them, viz. "The lands formerly wadset, now redeemed by the Company, is exclusive of and never can comprehend the wadsets in question, which were *then and are still unredeemed*. However broad, therefore, the words of the extract of the decree of sale may be, they cannot avail the respondent, as that decree of sale cannot go beyond the limits of its warrants. This decree, and the act of Parliament having not authorized the sale of the reversions in question, the interlocutor ought to be reversed, and a return made to the interlocutor of the whole Lords of 1st July 1778.

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*Pleaded for the Respondent.*—It is an admitted fact that the York Buildings Co. purchased from the Government both the right of redemption and the superiority of these wadset lands, and that the Company uplifted the quit-rents or feu-duties payable from the same. Now there was nothing incompatible in making that the subject of a lease. It is a point established by the law of Scotland, that the profits of a wadset, holden of the reverser, are proper objects of lease. 2. The articles of agreement 11th November 1728, between the Company and Sir Archibald Grant and Mr. Garden for the lease to them of the estates of Pitcairn, Panmure, Southesk, and Marischall, under certain exceptions, it was specially provided that the lease to be granted of the lands, *with the teinds and other pertinents*, should be particularly enumerated under the exceptions of the lands of Dunnottar, Fetteresso, as in other leases of the like nature. No formal lease was executed, but the articles were binding on both parties, and possession followed. These articles let on lease the WHOLE estate of Marischall, under certain exceptions enumerated. Whatever was not excepted fell within the articles. No exception is made of the wadsets in question, and therefore it must be held to have been comprehended within these articles of lease; and if the lessees of the Company did not uplift the quit-rents and feu-duties derivable from these wadsets, they might have done so, as it was entirely in their power so to do. 3. It is further apparent that the act of Parliament intended the estate to be sold as a *universitas*, and not that any portion or parcel should be reserved to the Company. And the act

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expressly directs the same to be sold "as the same are, have, or *might* have been enjoyed or possessed under the said lease. 4. The same intention to include these wadsets in the sale is apparent in the proceedings of the Court of Session, in directing that sale, and the upset prices at which the wadsets were to be sold, to be increased by the sum of £945, among which wadsets were that of Clerkhill and Downieshill. But further, as the superiority of these wadsets is included in the respondent's purchase, the right of reversion must follow; a point established by the law of Scotland, and particularly by the late decision *Lady Frances Erskine v. Lord Fife*.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of 3d of March 1779 be *reversed*; and that the interlocutor of 1 July 1778 be affirmed.

For Appellants, *Henry Dundas, Ar. Macdonald*.

For Respondent, *Al. Wedderburn, Alex. Wight*.

Not reported in Court of Session.

GEORGE HALDANE, Esq. of Gleneagles, *Appellant*;  
The Hon. JOHN ELPHINSTON of Cumber-  
nauld, Assignee of the now deceased } *Respondent*.  
GEO. KEITH, late Earl Marischall,

House of Lords, 11th April 1780.

**JURISDICTION—RES JUDICATA—INTEREST.**—A claim was preferred to the Barons of Exchequer, acting under a particular act of Parliament, and the amount of the claim adjusted, but the Barons disallowed interest thereon: An appeal was taken to the House of Lords, and dismissed as incompetent: In a new action brought before the Court of Session, held that it was competent to the Court to entertain the question, and objection to the competency repelled; and decreed for the amount of the claims, but without interest. Affirmed on appeal.

For the facts of this case *vide ante* p. 443.

The appeal then taken to the House of Lords from the Court of Exchequer was held to be incompetent; the consequence was, that no judgment was given upon the merits,

and, in particular, upon the question, Whether interest was due, and chargeable upon the debentures?

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The appellant then brought a new action before the Court of Session against the York Buildings Company as debtors, and James Ferguson, Esq. of Pitfour, purchaser of the Marischall estate, and against the Honourable John Elphinston, the respondent, for the principal sum contained in the debentures, together with the legal interest thereon from and since the dates of the foresaid decree, or of the debentures following thereon, and that he had a real lien upon the net balance of the rents and prices of the said whole forfeited estates. The respondent brought a counter action against the appellant, concluding for repetition of the sum which he had received, and also that he had no right to receive the sums claimed, in consequence of an act of parliament (1761) passed for the purpose of removing any disability in his person by reason of his attainder.

These processes having been conjoined, were reported by the Lord Ordinary to the whole Lords. The respondent pleaded *res judicata*, and besides, that the action was incompetent before this Court, the matter thereof being only cognizable by the Barons of Exchequer. The Lords pronounced this interlocutor:—"Repel the objections stated by Nov. 18, 1779.  
 "Captain John Elphinston to the competency of the action  
 "at the instance of George Haldane before this Court; and  
 "sustain his title to carry on said action; sustain the de-  
 "fences for the said George Haldane in the action of repe-  
 "tition of the sums in the two debentures at the instance  
 "of Captain John Elphinston against the said George Hal-  
 "dane; assoilzie George Haldane therefrom, and decern;  
 "but ordain George Haldane to assign his claim on said  
 "debentures to Captain John Elphinston to the extent of  
 "the sum he has received out of the balance of the price of  
 "the estate of Marischall, so far as not prejudicial to his  
 "own right; and find that the said George Haldane is en-  
 "titled to retain the sums contained in his two debentures  
 "libelled on, received by him in consequence of an order  
 "from the Barons of Exchequer; but find that no claim for  
 "interest lies to the said George Haldane upon the said two  
 "debentures; and remit to the Lord Ordinary to proceed  
 "accordingly."

On reclaiming petition against the disallowance of interest Dec. 4, 1779.  
 rest the Court adhered.

Against these interlocutors the present appeal was brought,

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in so far as the disallowance of interest on the debentures was concerned.

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*Pleaded for the Appellant.*—That the legislature never intended otherwise, by the act 4 Geo. I., than to give the most full and ample remuneration against the estates of those who had joined in the rebellion to those who had suffered loss and damage thereby. The object of the act was, that they might be indemnified. With this view their claim was ordained to be received, a preferable right was to be given them, and a *real* or specific lien upon a particular fund was also to be conferred. The act ordains these claims to be paid out of the *first* of the net produce of these estates; and this being the case, the appellant's debentures ought without any delay to have been immediately paid. While the fund was lying on hand unpaid it was yielding interest; and therefore interest is due upon every view of the case, and upon every known principle of law or equity. Whenever a debt is outstanding interest is due as a matter of right, and there is nothing in the act, under which the claim is made, which leads to the supposition that no interest was chargeable.

*Pleaded for the Respondent.*—That the act of Parliament did not authorize a further demand in name of interest, is already determined by the order of the Barons of Exchequer disallowing it; and by the judgment of your Lordships dismissing the appeal as incompetent,—this result necessarily implying that the Barons, as executors of the act, could do nothing else than what they did; and if they could not, neither could the Court of Session. But supposing it still competent to the appellant to argue upon the construction of the acts made respecting claims upon the forfeited estates, none of them give the least colour for his demand. They are totally silent as to interest upon the claims of sufferers; and it is not competent for the Court to go beyond the act, which must be executed strictly within its letter.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Al. Wedderburn, Dav. Rae.*

For Respondent, *Alex. Wight, J. Anstruther.*

Unreported in Court of Session.

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MARJORY STEWART and PATRICK GRAHAM, } *Appellants;*  
 her Husband, - . - . }  
 ANN, MARY, and JOHN GARDNERS, and Tho- } *Respondents.*  
 MAS GARDNER, their Father, - . }

STEWART, &c.  
 v.  
 GARDNERS.

House of Lords, 24th April 1780.

Sale of Succession—Agreement—Obligation—Discharge—

**Novation.**—An agreement was gone into by the residuary legatees in a settlement with the widow of the deceased testator, whereby the latter agreed to purchase their right of succession for a fixed sum, they assigning their interest over to her. Stewart, a neutral party, on behalf of the widow, interposed, and allowed his name to be used in the transaction ; and as the estate of the deceased was not then realized, became absolutely bound to pay the respective sums at which their interest was bought up. Thereafter the widow herself transacted with the beneficiaries, and granted bonds to some of them for the amount, without the interference of Stewart, and she granted time for payment. The widow afterwards fell into poverty, and could not pay. Held that Stewart was still bound, and that he was not released by the new transaction had with the widow herself, as that was a mere bond of corroboration, and did not discharge him.

The late Dr. Dalrymple, who had practised as a surgeon in St. Christophers, acquired a considerable fortune, and returned to Scotland and purchased an estate.

In advanced life he married Margaret Wemyss, then only Dec. 21, 1766. 20, and some short time thereafter executed a settlement conveying his whole estate and effects, real and personal, to Jan. 31, 1767. Margaret his wife, Wm. Wilson, James and David Wemyss, as trustees for the following purposes:—1. To pay off all his lawful debts, and his legacies, and death bed and funeral expenses. 2. To invest the surplus for the purpose of yielding an annuity to his wife ; and 3. After his death to divide the capital, if there should be no children of their marriage ; one half to his sister Janet, and her children after her decease ; the other half to the children of his sister Ann, wife of Thomas Gardner. These latter children are the respondents in the present suit.

Dr. Dalrymple died of this date, without leaving any issue April 1770. of the marriage. His surviving widow being then only 21 years of age, and the residuary legatees seeing that their interest could not open until her death, were anxious to prevail upon her to purchase their reversionary interest.

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With this view Mrs. Dalrymple intrusted the negotiation of such a transaction to Bailie Stewart of Cupar, the appellant's brother. And after various procedure, a meeting was held between the several parties interested, namely, John Stewart and David Sym on behalf of Mrs. Dalrymple, on the one part; Janet Dalrymple, the Doctor's eldest sister, and her husband William Anderson, of the second part; and Thomas Gardner, the husband of Ann, as administrator at law for his children. A contract was drawn up and signed on the spot, the general terms of which were, that each of the sister's families should have £650 for their residuary interest in the succession; and by the contract the said sisters, in consideration thereof, assigned and made over to and in favour of the said John Stewart and David Sym, their heirs and executors. There was an obligation on them to make up titles by service or otherwise to the heritable subjects and property possessed by the deceased, either at home or abroad, and that for the purpose of vesting the same in the said John Stewart and David Sym, and that the same "shall be concerned in such manner and in such form as their different natures require, and according as a man versant in business shall direct." "For which causes, and upon the other part, the said Bailie John Stewart and David Sym hereby bind and oblige them, their heirs, executors, and intromitters with their goods and gear, so soon as the said deeds shall be made and delivered to them, to content and pay to the said Janet Dalrymple and her children the sum of £650 Sterling, and to the said John, James, Margaret, Ann and Mary Gardners, the sum of £650 Sterling, and also to pay all the just and lawful debts that were due by the said deceased David Dalrymple at the time of his decease."

Thereafter John Stewart and David Sym assigned this contract to their constituent Mrs. Dalrymple. It appears that Stewart and Sym merely interposed as the friends of Mrs. Dalrymple, and neither were trustees under the deceased Dr. Dalrymple's settlement.

Janet, in terms of this agreement, assigned her interest over, in terms of the agreement, was paid the £650, and granted a discharge.

The respondent Gardner, however, on after consideration, thought the sum too little, and wanted £100 more. Mrs. Dalrymple yielded to the demand, and Bailie Stewart was again applied to, that he might interpose as in the former

agreement. This was agreed to, and a new agreement drawn out, narrating the deceased's settlement, and the above contracts; and binding Thomas Gardner to make up titles to one half of the estate of Lindisferran in Fife, and so soon as the same is done, to cause his children to convey the same to the said John Stewart; and setting forth, "For which causes, and, on the other part, the said John Stewart binds and obliges him, and his heirs and executors and successors, to make payment to the said Thomas Gardner, and his heirs, executors or assignees, for the use and behoof of his said children, of the sum of £750 sterling, and that at and against the term of Martinmas next to come, and with the sum of £100 sterling of liquidate penalty in case of failure."

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Some disputes arose afterwards, and Gardner, wishing further security, in particular, a bond and bill, Stewart finally came to the resolution of having nothing further to do with the matter, and wrote Gardner, "I have therefore made over my right to Mrs. Dalrymple, as you know it was upon her account that I made the agreement with you; and expecting that you will settle matters with her amicably, I remain," &c. No amicable settlement took place. Gardner charged upon the contract, and a suspension being brought, the appellant contended, 1st, That the respondent, Thomas Gardner, had no legal right in his person to the lands of Lindisferran, and therefore could not convey to another any such right. 2d, The estate was vested in trustees. 3d, The children of Thomas Gardner, who had the real beneficial interest, were all minors. 4th, The sale by Thomas Gardner, as administrator at law for his children, was invalid, because he assumed a power which, by law, that office did not entitle him to exercise; and, 5th, That the respondent therefore, not being in a condition to implement his part of the contract, Bailie Stewart could not be compelled to pay the agreed on price. The Lord Ordinary found, "that as the suspender's (Bailie Stewart) view July 16, 1773. or interest with the contract, was to secure himself a purchase of the charging children's share of the deceased Doctor Dalrymple's estates; and that it appears the charger has no title effectually to make the sums over to the suspender, suspends the letters, and decerns." A reclaiming note was presented to the Inner House, but the respondent proceeded no further.

After two of the children had accepted of their shares,

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STEWART, &c. *v.* the three remaining children transacted of new with Mrs. Dalrymple herself, who granted to them the following bond:

GARDNERS. "executors and successors, to make payment to the said "John, Ann, and Mary Gardners, of the foresaid remaining "sum of £450 Sterling, with interest thereof from the said "term of Martinmas 1772, amounting when accumulated at "the date hereof, to £488. 19s. 1d., by three equal portions, "as they arrive respectively at the age of 21 years com- "plete, or upon the marriage of the said Ann or Mary Gard- "ners, which of them shall first happen; and failing any of "them by decease, before they arrive at the age of 21 years "complete, or marriage of the females, to the child or chil- "dren then alive."

July 25, 1779

From this date Bailie Stewart considered himself as totally relieved from all obligation. After his death, however, the present action was raised against the appellant, his sister, and against Mrs. Dalrymple, the latter in the interval having fallen into poverty. The Lord Ordinary pronounced this interlocutor:—"In respect it appears that Bailie Stew- "art acted only as trustee for Mrs. Dalrymple, the widow, "and that it is not alleged he had any intromissions with "the effects or estate of Dr. Dalrymple; on the contrary, "that £300, and a bond for £450 were accepted from the "widow herself, sustains the defence for the sister of Bailie "Stewart, and assoilzies them, and decerns." On representation, the Lord Ordinary reported the case, on memorials to the Court.

Jan. 12, 1780.

It was maintained by the appellant, that her brother acted merely as trustee for Mrs. Dalrymple throughout, and did not enter into the transaction for his own behoof. Even if he had, it was clear, according to the law of Scotland, that the contract fell to the ground, by one of the parties becoming unable to perform the part of the contract. Gardner, in this case, could not perform his part, he had no right to assign, to make up titles, or to transact as to the sale of his chil- dren's right of succession; and, 2d, Besides, by the new transaction with Mrs. Dalrymple herself, and the three chil- dren who have now raised this action, the contract 1772 was virtually passed from as against Bailie Stewart. The Court pronounced this interlocutor:—"Repel the defences for "Marjory Stewart and husband, and decern against them, "in terms of the libel; find expenses due by them, and ap-

" point an account thereof to be given into Court." On re- 1780.  
claiming petition the Court adhered.

Against these interlocutors the present appeal was <sup>STEWART, &c.</sup>  
brought. <sup>v.</sup>  
<sup>GARDNERS.</sup>

*Pleaded for the Appellants.*—It is established, and appears Jan. 27, 1780. to be admitted by the respondent in the former suit, in the suspension, that Mr. Stewart was merely a trustee for Mrs. Dalrymple, deriving no advantage from the transaction, and only interposing to bring about a compromise between the parties. They had a regard therefore to Mrs. Dalrymple, and relied on her faith for completing and fulfilling the agreement which her trustee, Mr. Stewart, had made on her behalf. 2. The agreement entered into by the respondent with Mrs. Dalrymple made essential alterations in the original contract, and such as in equity must relieve the appellant from the legal consequences thereof. The respondent treats with Mrs. Dalrymple DIRECTLY—takes from her the shares stipulated by the former contract to two of his children; agrees to new covenants for payment of the shares of the three children, and gives a delay or indulgence to the widow, as to the term of payment, thereby cutting off every relief which the appellant might have had against Mrs. Dalrymple, when she had the whole deceased's estate entire and in her possession, and before she had fallen into poverty. In these circumstances, the appellants maintain they are liberated in law from all obligation.

*Pleaded for the Respondents.*—By the contract 1772 entered into by John Stewart and Gardner, Stewart bound himself, his heirs, executors, and successors, to pay the respondent the sum of £750, and this absolutely, without any condition or reservation whatever; and such being the nature of his obligation, it does not affect the question in the slightest degree, whether he acted as trustee for Mrs. Dalrymple or not, since, on the face of that obligation, he does not bind himself in that capacity, but absolutely and directly to the respondent. No doubt Bailie Stewart had conveyed to Mrs. Dalrymple all his interest in this contract, but he could not thereby divest himself of the obligation come under to pay the £750 to the respondent; and he remained bound under that obligation until he was with the respondent's consent released therefrom. The bond taken by Mrs. Dalrymple is expressly in corroboration of and without derogation from the contract, and so could not discharge and release Bailie Stewart from the obligation.

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MAGISTRATES,  
&c. OF DYSART.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Henry Dundas, Edw. McCormick.*  
For Respondents, *Al. Wedderburn, Al. Wight.*

NOTE.—This case not reported in Court of Session.

(M. 14519.)

Colonel JAMES ST. CLAIR of St. Clair, *Appellant;*  
The MAGISTRATES and TOWN COUNCIL of the } *Respondents.*  
Burgh of Dysart, - - - - -

House of Lords, 8th March 1780.

SERVITUDES—OF BLEACHING—OF FOOT ROAD—OF TAKING WATER—PRESCRIPTION—USE AND POSSESSION.—A servitude of bleaching linen sustained; also a servitude in favour of the inhabitants of a burgh, of taking water from the wells in a neighbouring heritor's property for family use, as well as a servitude acquired by immemorial use of a right to a foot road to these wells. Also that the burgh, as a corporate body, by the charter of the burgh, had a sufficient title to acquire such servitudes, by prescription and immemorial use and possession of its inhabitants.

Delarator was raised by the appellant, stating that “it ought and should be found and declared, that he had the only good and undoubted and exclusive property of the wells and enclosures, called the Lethem Wells and Ashlerhead Parks, and to the rock called the Ashlerhead Rock, situated within his barony, and that free of any servitude in favour of the magistrates, town council, community, burgesses, and inhabitants of Dysart, of taking water from the said wells, or washing, bleaching and drying their clothes and linens at the same, or upon the grounds adjacent thereto; or occupying or possessing any part of the said enclosures; and that the said magistrates, town council, and community, burgesses and inhabitants of the said burgh, have no right or title to any roads, ways, or passages to and from the said wells through the said enclosures, or any part thereof, and that they should desist and cease from all further troubling and molesting the said pursuer in taking water from the said wells, or by washing, bleaching or drying their clothes and linens thereat or upon the grounds adjacent thereto.” In de-

fence to this summons the respondents alleged that the magistrates, community and inhabitants of Dysart had been in the peaceable and uninterrupted possession for time immemorial of the springs called Lethem Wells, together with a piece of ground or green adjacent thereto, called Dysart Washing Green, for bleaching and drying their clothes, and bleaching their linen webs and yarn, about a quarter of a mile from the town, upon the sea coast. And the said inhabitants have from time immemorial since the existence of the burgh, been in the constant use of taking water from the said wells for their houses and families, and have used the ground adjoining thereto as a washing-green for washing, bleaching and drying their linens, without the smallest interruption—this being a pertinent of the burgh, and which belonged to them as much as any other part of the common good; and therefore a servitude was established in their favour. In reply, it was admitted that the town's people had been in the immemorial use, not only of washing at the two wells, but of drying and bleaching their clothes and linens upon the west washing green; but contended in point of law that this was by mere tolerance, and therefore could not create the right of servitude, however long their possession; because no such servitude as of bleaching was known in the law of Scotland.

The Lord Ordinary pronounced this interlocutor, with Nov. 22, 1777.  
 respect to that article of the appellant's summons, whereby he claims to have it found and declared "that the Ashlerhead and Lethem Wells Parks, with the wells themselves, and grass grounds adjacent to said wells, are his sole and exclusive property free from any servitude in favour of the magistrates and council of Dysart, burgesses and inhabitants, of taking water from or washing their clothes and linens at said wells, or of bleaching and drying their clothes and linens upon the grounds adjacent to said wells, or of any roads, ways and passages to and from said wells, through the Ashlerhead and Lethem Wells Parks."  
 " As it stands acknowledged on the part of the defenders that the grounds and other particulars above mentioned, comprehended under this article of the pursuer's summons, lie locally within the pursuer's barony, and without the bounds of the royalty of Dysart, found and declared that the sole and exclusive property of all and singular the premises belongs to the pursuer; and that any right or interest which the town as a body corporate, and for behoof

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" of its burgesses and inhabitants, have or can pretend to  
 " or upon any of the premises, can be no other than a right  
 " of servitude; and however comprehensive the pursuer's  
 " summons is, as to a total exemption from any such servi-  
 tude, as in the course of the proceedings he has so far  
 " restricted his claim under this article, in consideration of  
 " the distress it would be to the town were they to be to-  
 " tally deprived of the wells, as to yield to them (*ex gratia*  
 " as he contends) the liberty and privilege of taking water  
 " from the two westmost wells, for the use of their families,  
 " and of one road to said wells, for the foresaid purpose;  
 " but opposes an extension of said privilege to the taking  
 " water from said two wells for washing their clothes and  
 " linens, or of bleaching or drying the same upon that spot of  
 " ground adjacent to the said two wells, described in the  
 " plans by the words west washing green: acknowledging at  
 " the same time, that the town's people have been immemo-  
 rially in use, not only of washing at the said two wells,  
 " but of drying and bleaching their clothes and linens upon  
 " the aforesaid West washing green, but which he pretends  
 " was a mere precarious indulgence, and therefore could  
 " create no right; and that the town as a body corporate, or  
 " its burgesses and inhabitants as individuals, could not ac-  
 " quire any such servitude by prescription, nor any such  
 " servitude known in law: Finds, That the town of Dy-  
 " sart, as a body corporate, could, for behoof of its burgesses  
 " and other inhabitants, acquire by purchase, or by imme-  
 " morial usage and prescription, the servitude here contend-  
 " ed for in its full extent, of water from said wells for  
 " family use, washing, drying, and bleaching their clothes and  
 " linens; and therefore, independent of the concession made  
 " by the pursuer, of the water of these two wells for family  
 " uses: Finds, That the corporation, for behoof of its bur-  
 " gesses and inhabitants, have by immemorial usage and pre-  
 " scription, acquired a servitude or privilege of taking water  
 " from said two wells, both for family uses and for washing  
 " their clothes and linens, and of drying and bleaching the  
 " same, upon the said west green; and prohibits and discharges  
 " the pursuer from molesting them in the enjoyment of said  
 " right. And with respect to the roads by which the inha-  
 " bitants shall have access to and from said wells, as it  
 " stands acknowledged on the part of the pursuer, that be-  
 " fore the Ashlerhead and Lethem Wells Parks were en-  
 " closed in 1754, the town's people had passage to said

" wells by two foot roads, as marked in the plans; and  
 " which they continued to use till within these few years,  
 " that the deceased General St. Clair caused remove said  
 " stile to the north-east corner of said park, where it now  
 " stands; found That the corporation of Dysart, for behoof MAGISTRATES &c. OF DYSART.  
 " of its burgesses and other inhabitants, have, by the like  
 " immemorial usage and possession, acquired right to a foot  
 " road from the lower part of said town along the beach to  
 " the foresaid wells; and for that end, to place a stile upon  
 " any dyke that may intercept the passage by said road;  
 " and found, That they are likewise entitled to another  
 " foot-road or passage to said wells, by a stile to be placed  
 " either at the north-west or north-east corner of the Leth-  
 " em Wells Park, and to have the use of the said stile where  
 " it now stands at the north-east corner." On reclaiming  
 petition the Court adhered.

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Mar. 3, 1779.

Against these interlocutors the present appeal was brought, in so far as the use of the water was taken for washing and bleaching, and also against the bleaching of clothes on the appellant's property.

*Pleaded for the Appellant.*—There is no such servitude known in law as the drying and bleaching of clothes or linen; such a servitude would resolve itself into a right of property, for, while the ground was covered with linen, it could be of no use to the owner. No right of property is claimed. They do not profess to have any title to such, because the washing green is the appellant's exclusive property. And the right which the inhabitants have exercised over it, by the indulgence and tolerance of the appellant, of bleaching linen, is not a right of property, nor can it be a right of servitude, because such a servitude the law does not acknowledge; which view of the law was supported by the case of Jaffray *v.* Roxburgh, where it was found that a Kelso Case, servitude of bleaching and drying linen upon the island call- ante Vol. I. p. 632; and App. ed the Ana or Sandbed, was not sustainable, as unknown in Vol. ii. p. 4. law. And the inhabitants of the burgh as individuals, who have thus claimed the right, have no title in them to acquire such by prescription.

*Pleaded for the Respondents.*—The corporation and community of the town of Dysart have been in the immemorial use and possession of the wells and washing green in question, and have bleached their linen thereon ever since the town was a burgh. And though the ancient charters of the

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burgh are now lost, and cannot now be appealed to, yet the last charter 1483 grants the territory of the town limited by no precise boundaries, with *all the privileges, liberties, and pertinents thereto belonging*. These latter words are equivalent to an express grant, as they suppose that, in the original charters, such a right had been conferred. At any rate, if the burgh has not a *right of property* over the same, it has acquired by this possession a right of servitude upon the wells and green, of taking water from the former, and bleaching their linens upon the latter. The servitude of bleaching linen is perfectly legal, and may be acquired. And it does not follow because such a servitude has not hitherto been known, that therefore it is not sustainable, because Lord Stair (B. i. tit. 7. § 5.) says, "That there may be as many servitudes as there are ways." The burgh, therefore, as a corporate body, and not the individual inhabitants for themselves, had acquired this right on behalf of the whole burgh, comprehending the burgesses and inhabitants of the burgh; and the magistrates and town council, being the trustees or managers of the burgh, and representatives of the community, the corporation can in no case possess, use, or acquire rights of this kind otherwise than through the inhabitants individually. And it has never been disputed that a corporate body has a good title to acquire such rights, and to preserve them by the use and possession of its inhabitants.

After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be affirmed.

For Appellant, *Al. Wedderburn, Ar. Macdonald.*  
For Respondents, *Henry Dundas, T. Erskine.*

NOTE.—The question as to bleaching, and the use of the water for washing and bleaching, was alone appealed. The judgment of the Court of Session as to the use of the water of the wells by the inhabitants *for family use*, and a road or access thereto, was acquiesced in.

REV. DR. JOHNSTONE, Minister of the Gospel, North Leith, and THOMAS GLADSTONE, Treasurer, for behalf of the Kirk-Session of the said Parish, and ROBERT STRONG, their Lessee, - - - - } *Appellants;*  
 MR. JAMES CHALMERS, Merchant, and JOHN WATSON, Cooper, both in Leith, } *Respondents.*

1781.

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 JOHNSTONE,  
 &c.  
 v.  
 CHALMERS, &c.

House of Lords, 6th April 1781.

TEIND FISH—DUTY—PAROLE—USAGE.—The minister of the parish of North Leith, by virtue of grants, has a right to exact a duty on all fish brought into the ports of Leith and Newhaven. Action being raised to enforce this right, held by the Court of Session, (1.) That the minister had no right to the tithe of fish brought into Leith and Newhaven, which were meant to be again exported, and, (2.) Nor to the tithe of fish which had paid teind where they were caught. In the House of Lords, affirmed as to the first point, but reversed as to the second; upon the ground, that a practice of so exacting teind on all fish brought into Leith and Newhaven, without distinction, was established by the proof led in explanation of the extent of the right.

The church and parish of St. Cuthert's of Edinburgh, were annexed to the abbacy of Holyroodhouse, at the time it was erected into an abbacy in 1128.

The parish of St. Cuthbert's and abbey lands then extended to Newhaven and Leith, and, in virtue of the grant, a certain teind duty had always been exacted on the importation of all fish into Leith or Newhaven. The charter grants, “Ecclesiam sancti Cuthberti cum parochia et omnibus rebus que eidem ecclesiæ pertinet; volo etiam ut iidem canonici habeant libertatem molendini faciendi in eadem terra; et ut habeant in hereth. omnes consuetudines illas et rectitudines, et asiamenta, viz. in aquis, in piscationibus, in pratis, in pascuis,”—“et Inverlet illamque vicinor est portui cum rectis divisis et cum ipso portu et cum medietate piscationis et cum tota decima totius piscationis quæ ad ecclesiam sancti Cuthberti pertinet.”

In 1606, an act was passed for erecting the kirk of North Leith into a separate parish. And the abbacy, after the Reformation, being erected into a temporal lordship, Lord Holyroodhouse, in 1631, sold and conveyed to the “minister, elders, deacons, kirk-session, neighbours, and inhabitants of the parish of North Leith, and their successors, as a provision for the maintenance of the minister, &c. of that parish, heritably and irredeemably, all and sundry the

1781. " teind fish of Leith and Newhaven, of whatsoever sort or  
" kind, with the pertinents used and wont."

**JOHNSTONE,**  
&c.

**v.** This title was supported by decrees of the Court of Session in 1635 and 1662, declaring their right to the teind fish brought into Leith and Newhaven.—In the present case, the appellants claimed, as in use and wont, under the above title, for evcry last of herrings (12 barrels) 1s. 8d., and the twentieth fish of all other green or dried fish ; and, in exacting this teind duty from the respondents, the latter refused to pay, which resulted in the present action. In defence, it was stated, 1st, That the kirk-session of North Leith was not entitled to exact teind duty on fish which had paid teind at the place where they were caught ; and, 2d, That they were not entitled to exact it on fish imported into Leith and Newhaven, for the purpose of being again exported.

**July 23, 1777.** The Lord Ordinary found, " That as it is admitted that  
" the fish in question paid teind where they were caught,  
" they cannot be subjected to a second teind upon their im-  
" portation into Leith. Found no necessity to determine  
" the question, Whether they would be liable to teind, if  
" they were exported from Leith ?"

**Nov. 29, 1777.** On representation, the Lord Ordinary pronounced this interlocutor : " Adhere to the last interlocutor upon the general point, finding, that the fish which paid teind where they were caught, are not liable to pay a second teind on importation. Find, that the respondents must pay teind for the 579 barrels, which they admit were used for home consumption, excepting so far as they can shew that every part of them paid teind where they were caught ; but as to what was exported to Jamaica, Grenada, Tobazo, and London, find that they are liable to no teind, and decern."

**Dec. 16, 1777.** On further representation, the Lord Ordinary adhered.

**July 1, 1778.** On reclaiming petition to the Court, the Lords pronounced this interlocutor : " Repel the defences to this action, and find the defenders liable to the pursuers in 20s. Scots for each last of herrings, and in one dry fish out of each twenty, landed by them respectively in the ports of Leith and Newhaven ; and remit to the Lord Ordinary to proceed accordingly, and further to do as he shall see just."

The defenders gave in a petition against this interlocutor, in which they stated many averments relative to the practice ; and the Court, on advising the petition with answers, appointed them to give in a special condescendence of the circumstances, and of what they offered to prove. This be-

ing done, the Court remitted to the Lord Ordinary to hear parties, and to do therein as he might see just. His Lordship ordered a proof, which, after being taken, the Lord Ordinary reported the whole cause to the Court. The parties deduced different conclusions from the proof. The appellants alleged that this duty was payable, and had been constantly paid, upon importation of all fish at the ports of Leith and Newhaven, without distinction whether they were for exportation or home consumption, and that no drawback or return had ever been exacted or uplifted. The respondents, on the other hand, alleged, that for 40 or 50 years back, it was established by the proof, that the kirk-session and their lessees were in the practice of taking such a composition upon the whole as the merchants and dealers in fish choose to give. Whereupon the Lords pronounced this interlocutor: "On report of Lord Monboddo, and having Dec. 5, 1780.  
" advised the proof adduced, and informations *hinc inde*, the  
" Lords find, that the pursuers, the minister and kirk-session  
" of North Leith, and the tacksman, are not entitled to draw  
" from the defenders any teind of any fish which shall be im-  
" ported by them into the port of Leith, and afterwards ex-  
" ported; neither are they entitled to draw from the defenders  
" any teind of any fish which, from a certificate from the  
" minister of the parish, where they were caught, or other  
" titular having right to draw the teind thereof, shall appear  
" to have paid teind elsewhere, and remit to the Lord Or-  
" dinary to proceed accordingly; and further to do as he shall  
" see just."

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&amp;c.

v.

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Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The church of North Leith, as well as the duty on fish now in question, originally belonged to the abbacy of Holyroodhouse. That institution being turned into a temporal lordship, the Lord thereof conveyed the teind fish of Leith and Newhaven, to the parish of North Leith, to which it became annexed, for the maintenance of the minister, reader, and schoolmaster of the parish.—Since then (1631) the kirk-session of North Leith, as is shewn from the proof, have had their right to uplift this teind fish twice established by the Court of Session, which has pronounced judgment twice in favour of the minister and kirk-session of North Leith. And this right holds with reference to fish brought to Leith and Newhaven for the purpose of being exported, as well as to fish that have paid teind at the places where they were caught. The right extends to all

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**JOHNSTONE,**  
&c.*v.***CHALMERS, &c.**

fish whatever imported, without regard to whether they are intended for export, or have already paid teind at the place where they were caught. The right conveyed to the North Leith parish is unqualified by any exemption of the nature here referred to.—It is imposed on, and exigible from, all fish imported into these places, without distinction. But as the objection, that the fish have paid teind where they were caught, and so are not liable to pay teind when imported into Leith and Newhaven, is founded on the supposition that the duty so payable, was really in the true sense a teind duty, it was necessary to confute this erroneous idea. Although called by that name (teind), yet, from the thing out of which it is paid, as well as the *quantum* payable, it is clearly not a tithe, and can only have got the name of teind from its being paid to the minister with the other teinds of the parish. Tithe is payable out of land,—the smaller tithe out of rural or farm produce. It is truly an impost, or port duty leviable on all fish, without exception, by the minister and kirk-session of Leith, and no more.

*Pleaded for the Respondents.*—The right to the vicarage or small tithes of a place, which this undoubtedly was, cannot extend to what is neither produced nor consumed in that place. The appellants' title could be no broader than that of Lord Holyroodhouse, their immediate author, which was to the tithe fish of Leith and Newhaven, as included in the tithes of the parish of St. Cuthbert's. And could never at any time mean more than the fish caught by the people residing in those places, or fish brought in for sale and consumption. But this being nothing more than a tithe, it is contrary to principle, and to the nature of the thing, that tithe should be exacted twice for the same thing. When the tenth part of the produce of industry was affixed to the church for its support, the wildest rapacity of the church of Rome never went so far as to charge this tenth twice on the same article.—Here the fish are charged with teind where they were caught; and it is again charged upon them when brought into Leith and Newhaven, which is a claim quite unfounded and untenable. And it is no answer to this, to maintain that this is not a tithe, but a tax or duty upon fish imported in these ports, because this, beyond all doubt, is nothing but the vicarage, or smaller teind of the parish. The dues of the harbour of Leith, &c., were quite distinct, and the right which was originally in the abbacy to the harbour and shore dues, is now vested in different parties

altogether, namely, the Magistrates of Edinburgh ; but the tithe fish of St. Cuthbert's was in Lord Holyroodhouse as titular, and conveyed by him, as a distinct right, to the North Leith parish. It is therefore illegal to exact tithe twice, or to exact teind on fish merely imported for the purpose of export.

1781.

~~JOHNSTONE,~~

&amp;c.

v.

~~CHALMERS, &c.~~

After hearing counsel, the

**LORD CHANCELLOR** said :

" My Lords,

" There are two points which the Court below have determined, namely, 1st, That the minister of North Leith had no right to the tithe of fish brought into Leith which were meant to be again exported. 2d, Nor to the tithe of fish which had been paid at the place where caught, and, after considering the case maturely, I move your Lordships that the interlocutor be affirmed upon the first point, but reversed on the second point; resting my judgment upon the proof brought, of the practice of so drawing the teind in the latter case.

It was ordered and adjudged that the interlocutors of the (Lord Ordinary) 23d July, 29th November, and 16th December 1777, complained of be *reversed*; and that in the interlocutors of the (Court) 18th November 1780, and 5th December adhering thereto, after the words "into the port of Leith," the words "for exportation," be inserted: And that so much of the said interlocutors as find that "neither are they (viz. the pursuers) entitled to draw from the defenders any teind of any fish which, from a certificate of the minister of the parish where caught, or their titular having right to draw the teind thereof, shall appear to have paid teind elsewhere," be *reversed*.

For the Appellants, *Henry Dundas, Tho. Erskine.*

For the Respondents, *Dav. Rae, John Maclaurin.*

JAMES BYWATER, - - - - - *Appellant;*

THE CROWN, - - - - - *Respondent.*

House of Lords, 1st May 1781.

COURT OF JUSTICIARY — JURISDICTION — APPEAL. — Competency of an appeal to the House of Lords from the sentence of

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the High Court of Justiciary in Scotland. Held such an appeal incompetent.

A petition and appeal was presented by the appellant, a criminal under sentence of death, against the sentence of the High Court of Justiciary in Scotland, condemning him, preferred to the House of Lords, on the ground that, in the list, or copy of the panel, delivered to the prisoner at the time of his trial, there was a misnomer of one of the names of the panel; and though he had made objections to any verdict being pronounced, yet the Court repelled the objection, and praying a reversal of the sentence.

LORD LOUGHBOROUGH,

" My Lords,—I have in my hand a petition and appeal of James Bywater, from a judgment of the Court of Justiciary in Scotland, on a capital conviction, and the question is, how far is it or is not to be received ?"

LORD MANSFIELD,

" My Lords,—“ This is a petition in the nature of an appeal, from a sentence of the Court of Justiciary in Scotland, by which the petitioner is adjudged to suffer death. The error that is assigned is not an error appearing upon the record, or upon any of the proceedings; but it is a complaint of an irregularity during the trial, which is of this sort. By law, a copy of the panel of the jury is to be given to the prisoner. At the trial, the jurors are called over, and the prisoner is asked, one by one, whether he has any objection to them; if he has any objection, he makes it, and the Court judge immediately of it. If the objection is allowed, they go on, and call another juror as they stand in the panel. It seems this juror's name was spelt differently by a letter or two from the real way of spelling it. At the trial he is called by the true spelling. He is called by the true spelling in the process, and the prisoner is asked, whether he has any objection to him; he says he has no objection at all, and consents to his being sworn? If he had made an objection, as I have said, it would only have concluded with calling another juror. The mis-spelling was in his knowledge, and was not in the knowledge of the prosecutor,—this is the error assigned. An appeal in a capital case most undoubtedly, upon such an error as this, you will not allow: for it is really no error, and no objection can now be made; it must be taken advantage of at the trial or not at all, and here it is expressly waved; but I only mention that, to shew how trifling the objection is; but the object now for your Lordships' consideration is not upon the merits on either side, but Whether, be the error what it may, this House has any jurisdiction on the subject? and as the matter has passed since I had the honour to sit in this House several times, I have, as at present advised, formed an opinion that the ap-

peal is not competent, and that this House has no jurisdiction in any appeal in a capital case; for there is no occasion to go further than the question before your Lordships calls upon me to do. By the articles of Union, the Court of Session, and the Court of Justiciary, are, to all intents and purposes, with all rights, forms, customs, manners, privileges, &c., to remain just as they were before. At the time of the Union, it was clear established law that there lay an appeal from the Court of Session to the Parliament of Scotland, and therefore that jurisdiction devolved upon this House, from the moment of the Union down to this day, as your Lordships well know, and it has been very beneficial to that part of the kingdom. Appeals have regularly been brought and adjudged of from the Court of Session. At the revolution, the bill of rights expressly claims as a right, the privilege of appealing from the sentences of the Court of Session, but, with regard to criminal cases, there never existed an idea of an appeal from the Court of Justiciary before the Union. They in express words say, there lies no appeal. There is not a single book that says there does lie one. The bill of rights, which claims a right of appealing in civil cases from the Court of Session, does not say a word of criminal cases, or of the Court of Justiciary, and, agreeable to this, there has not existed an instance of an appeal to this House, in a criminal and capital case, from the Court of Justiciary in Scotland, since the Union, and yet men have been hanged every day, and they have made objections below, which objections below have not availed them."

"There never yet has existed an appeal here, (I shall state to your Lordships by and by the only case that is alleged to the contrary), and so it went on to the year 1766; and in that year a very extraordinary case, for the atrocity of the crime, and for the starting Case of Ogilvy. of this objection, happened. A lady of family and birth was so far seduced, either by her own wicked inclinations, or by the brother of her husband, that they two, with an adulterous incest between them, ended it by the murder of the husband. Being persons of rank and fortune, they litigated their trial, and they had very able counsel to assist them. They were sentenced to death, a punishment which was not too severe for their crimes. She pleaded pregnancy. She was found to be pregnant, her sentence was respite till her delivery. It entered into no man's head that there lay an appeal to the House of Lords that would suspend the execution, so the brother was executed, not having thought that an appeal lay to your Lordships. By the time the lady was delivered, an experiment was suggested. It was during the recess of Parliament, and opinions (as they were called) were taken of counsel below; opinions were taken of counsel here. Indeed, I cannot call them opinions that were given, they were dissertations, and the dissertations concluded to try the experiment; and they saw no reason why an appeal should not lie in a criminal as well as civil case, and that it would be terrible if it did not, for the Court of Justiciary might try and execute men who had

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been guilty of no crime, and there would be no redress. The scheme was tried, but the Parliament not being then sitting, the execution would have proceeded, therefore they petitioned the king (not in council) to grant reprieve, to permit the party to bring an appeal to the House of Lords; and they lodged with the Secretary of State the opinions they had taken, that seemed to be of that side of the question. There was an opinion of a gentleman at the bar here in England, who, most certainly, by his opinion, never heard a word of the laws of Scotland, or had an idea of what they were. Upon this petition a reprieve was granted,—it was temporary only. The then Lord Advocate (Sir Thomas Miller) was wrote to, to give an opinion upon the appeal. There is from him upon this subject as able, clear, decisive, and learned an opinion, as there is upon any one subject or point of real history or law, and it is impossible for any man who reads that report to doubt; for he says, ‘I have directed searches to be made into all the records of Parliament; I have directed searches into the records of the Court of Justiciary; I have looked into the records of council; I have looked into the law books; the law books (particularly Lord Stair) say expressly, there is no appeal in a criminal case. There is no book to be found that ever said there was. There is no instance of an appeal to the House of Lords since the Union. Besides, great inconveniences would arise, if there was liberty for every criminal to appeal from a sentence of condemnation.’ My Lords, upon full consideration of this report, and likewise upon what they call opinions on the other side, his Majesty took the opinions of all the Lords of the Cabinet Council. The question had been well considered, and they were unanimously of opinion, and the noble Lord who then sat upon the woolsack was one, I was another, who, upon full conviction, (and I have never changed my opinion since, but have grown stronger and stronger in it), advised his Majesty, that as the crime could not call for mercy, (it being of the most flagrant and atrocious nature), that there was no right to appeal to the House of Lords; but if there had been, they certainly had no right to call upon the king to grant a reprieve. They could not stop the execution by an appeal. That argument affords a demonstration that the law did not give them a right to appeal. Where the execution can never be remedied, it is a stay of proceedings; they cannot proceed where a writ of error is allowed, to execute the man in the meantime; but there is no way of staying the execution by a right to appeal to a jurisdiction that does not always sit; the man is hanged before that jurisdiction can hear of it, and therefore, an application to the king for a reprieve in aid of the jurisdiction of the House of Lords, showed there could not exist such a jurisdiction, and therefore, the reprieve was suffered to expire. The lady made her escape. I do not know what became of her afterwards. In the year 1768, there was an application by a gentleman at the bar, who was prosecuted for bribery at an election; he was a Member of Par-

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liament, he pleaded, in stay of any proceeding, that it was a criminal prosecution before the Court of Justiciary, and he pleaded privilege of Parliament, in stay of any further proceeding. The Court of Justiciary allowed him the privilege of Parliament, stopped further proceeding, and adjourned to a particular day. An appeal from this interlocutory order was presented to this House ; the House doubted of their jurisdiction, and referred it to a committee to examine and report whether it was competent. Before that committee, which was extremely well attended, the whole matter was gone into with wonderful pains and diligence. It was fully argued, all the records had been searched, and I have here a volume of the copies of the records that were then recited ; there were the records from the Parliament of Scotland,—from the council,—every instrument from whence any argument could be drawn ; and after hearing all the arguments, and considering of all those precedents, the Lords of the committee, and the House afterwards, were clearly of opinion that the order made by the Court of Justiciary was wrong ; but they were of opinion, that they had not jurisdiction to receive the appeal, and a middle way was taken to adjourn the consideration, whether the appeal was competent, or might be received (here his Lordship spoke so low, as not to be distinctly heard)."

" It was sent back with liberty to the parties, notwithstanding the appeal, at the day to which the cause was adjourned, to pray the Court to reconsider whether it was by the common or statute law of Scotland upon which they founded their right to take cognizance of the subject : because there was no common law, there was no statute law, which allowed a member of Parliament a privilege against a prosecution for crimes. If they went upon the usage of Parliament, they had no right to take cognizance of that matter upon that ground, and if they went upon that, they mistook it, for there is no usage of Parliament that says that a member of Parliament shall not be prosecuted for crimes. Therefore it was sent back, with that direction perfectly well understood at the time, and no more was heard of it ; but all the precedents were fully discussed at that time, and the opinion they formed was very clear that they did not go to shew that there was any usage whatever of an appeal before the Union in criminal cases. After this there came another case before your Lordships, and that was the case of the Earl of Eglinton and one Campbell, and the Court there, upon a doubt being started, whether that murder was committed within the limits of the admiralty jurisdiction, or within the limits of their jurisdiction, determined for their own jurisdiction. Upon this Campbell petitioned the king ; his petition was referred to this House, a committee sat, and they called upon the agent for the petitioner to proceed ; they had been fully apprized of all the doctrine upon this point, and therefore they held it with so strict a rule, that the agent, not being ready

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reported to the House that the petition should be dismissed, which the House agreed to, and dismissed the petition."

"Another case happened soon after, and that was the very same prisoner upon the same prosecution. When it went back, the Court of Justiciary (as is the practice there) found the indictment relevant. Upon their finding the indictment relevant, the prisoner immediately petitioned the House of Lords. Upon that petition being read, it was objected to as not competent. The agent was called in, and asked if he could produce a single instance of an appeal to the Parliament of Scotland before the Union, or to the House of Lords since, from an interlocutory order in a criminal prosecution. The agent said he could produce none. Upon which the petition was rejected, and rejected upon this plain ground, that if there is no precedent, there can be no such jurisdiction; for it never having happened, it is decisive that it never could, because the case happens every day; but it does not rest here, and if it barely rested here, perhaps the proper method would have been to have referred this to a committee. But, I apprehend, this petition ought not to be received or countenanced so far, as to go to a committee, after the question has received so full consideration and discussion as it has done in the case of the King against Miller and Murdison, which was in the year 1773. Upon the 10th of March 1773 there was a final condemnation. The Court of Justiciary, after the verdict, overruled the objections, just as in this case, to arrest the judgment, and adjudged the prisoner to death. From this sentence he appealed to this House. Your Lordships referred it to a committee; the committee reported it, and upon that report the House resolved that the petition should be rejected, and rejected upon this ground, (there could be no other,) that it was not competent, and that the House has no jurisdiction. Thus it stands finally determined, finally adjudged, and, as I said before, the question cannot admit of a doubt. I rest my proposal to your Lordships to reject this petition upon a clear authority in point and solemn judgment. If it was proper to go into the argument, there cannot be a single doubt. What is it whether the sentences of a court, having jurisdiction, should be subject to the review of another court, and under what restrictions and limitations, is matter of positive law, and where there is no positive law it must depend upon usage, usage must decide it? It is the creature of usage—(spoke so low as not to be distinctly heard.)"

"I mentioned to your Lordships several precedents that were laid before us. There was not from before the Union a single case of felony or misdemeanour where there could be an argument rested or drawn to support the point. There was what they called Repealing Dooms of Forfeiture. They were acts of Parliament—all these cases not in the shape of an appeal. There were two instances that were quoted, and great stress laid on, to shew that there had been at least

a notion : one of them the authority of this House, to receive an appeal from the Court of Justiciary. In the year 1713 (I lay an emphasis upon the time) the Magistrates of Elgin chose to incline to encourage those of the Episcopalian persuasion, and the Magistrates of Elgin gave to an Episcopalian minister, qualified under the Act of Toleration, a little chapel, which they said was their property. When they had given this to him, and delivered the key, and he officiated, it was taken up by the Procurator of the Kirk, and it was brought up by the then Lord Advocate (if I do not mistake) as the subject-matter of a criminal prosecution before the Court of Justiciary. A criminal prosecution ! Why ? Because the Magistrates, thinking the building and the ground to be their own, had given it to a minister, that was tolerated according to law, to perform divine service there ; What was the charge ? The charge was a civil question, that the chapel did not belong to the Magistrates, but belonging to the kirk, that they had taken the property of the kirk, and given it to a toleration minister, and the only question was, Did it belong to the kirk or the Magistrates ? And was the petitioner to be restored to the possession and quietude in the enjoyment of it ? Times were then warm. When it came before the Court of Justiciary they were startled a little at proceeding upon this, and they said it was a civil question, and they remitted it to the Court of Session to try Whether the matter in dispute belonged to the Magistrates or the kirk ? The Court of Session tried and determined that it belonged to the kirk. This civil question is carried before the Court of Justiciary, and the Court of Justiciary, upon the foundation of the sentence of the Court of Session, ordered the key to be delivered to the Procurator for the Kirk ; and, besides *that*, they imposed a fine. The Magistrates appealed to the House of Lords from the sentence of the Court of Session, and, that I might be correct, I looked at the petition before I began to trouble your Lordships. The petition is this :—‘ An appeal from the sentence of the Court of Session, and the proceedings of the Court of Justiciary founded thereupon.’ The order of the House of Lords is reversing the sentence of the Court of Session, and annulling what was done founded thereupon, that is, the delivery of the key and the fine. There are no printed cases to be found in this cause, if they did print cases. There is no objection made in the answer here to the jurisdiction of this House, and indeed they could not. The foundation is the civil sentence of the Court of Session. And all that is built upon that must fall to the ground, when the House of Lords had reversed the sentence of the Court of Session, for then there never was such a sentence.”

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“ There has been no attempt in a criminal case, or any application to this House till 1768, when, as I stated, there was a very similar case occurred to me, to shew it in a stronger light. By the peculiarity of the law of Scotland, the Court of Session can judge of one crime, and that is forgery ; they examine by depositions, and if they

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find a man guilty, they remit him to the Court of Justiciary, to inflict the penalty of death, or a lesser punishment, and it goes upon their sentence to the Court of Justiciary. I do not take upon me to say whether the Court of Justiciary may acquit, but within this twelve months it has been determined that the Court of Justiciary can go into no evidence but what comes from the Court of Session, and the judgment of the Court of Session is the foundation for the execution of this man, if executed, because if the Court of Session had acquitted him, he never would have been sent to the Court of Justiciary. Suppose a man found guilty by the Court of Session, he appeals to the House of Lords, and the House of Lords reverse the decree of the Session; is it possible the Court of Justiciary can go on with the cause? It is impossible. The cause is taken away, therefore I have always been astonished how any stress can be laid upon this."

"Another case has been quoted, which undoubtedly is not a case for an appeal, which is the case of Campbell of Barisdale in the year 1754, and that was a very particular case. In the year 1754, they say a petition of appeal was brought and given to a Lord of this House to present, but it was discouraged: Hopes were given of a pardon, and so it dropped and never was presented; now, talking of an appeal and never presenting it, is an argument the other way. I perfectly remember what happened upon that case; it was pretty singular, though it was a nice point, and might bear a discussion. The law of treason is now made the same in Scotland to all intents and purposes as it is in England. Campbell, attainted by act of Parliament, was brought for judgment, and pleaded he was not the same person. In England the identity of the person must be tried by a jury, and a jury instantly called, and the verdict of the jury decides. In Scotland, in this case, the Court of Justiciary said no. By our practice (in Scotland) the Court judges of the identity, and therefore it is established, that if a man escapes out of prison, and is brought for execution, though he is tried originally by a jury to fix his crime, he is not tried by a jury to fix his identity, and that is the law; but it was objected, you must follow the law of England, for this is a case of treason. This was a collateral point, but notwithstanding, they adjudged him to be executed, and there was a petition and an appeal brought here to be discussed, and thought of for some time; and I remember extremely well my Lord Hardwicke consulting the Duke of Argyle, the Advocate of Scotland that was then, and I believe the present President of the Session, and myself, who was then Attorney-General, upon it; and a doubt arose whether it was within the 7th of Queen Anne; and whether, if within the 7th of Queen Anne, you must follow by analogy the law of England, and try it by a jury; if it was so, then he could not bring a petition of appeal of his own head, he must apply to the Attorney-General, or something analogous to it; but upon the discussion they were of opinion, so far as then advised, that an appeal did not lie, but that it was a

collateral matter, and they were to go by their own law (law of England); and I believe Lord Hardwicke signified to whoever had the petition in his hand, that, as then advised, he thought the petition would not lie. As to the person himself, there never was an idea that an appeal would lie; for, during the late king's reign, he was only reprieved, and it is during this king's reign he is pardoned; but he is the grandson of a very great grandfather who had behaved extremely ill, and for some reason was left out of the attainder, and this lad put in by some mistake, who was only a schoolboy at the time. And the present king pardoned him. Your Lordships see the very doubt in that case admits the point, that in a case of felony by the law of Scotland, there is no appeal, because the printed arguments turn upon the 7th Anne, which necessarily embraced the question as to the right of appeal. For these reasons, I move your Lordships that this petition be rejected."

It was therefore ordered and adjudged that the appeal be dismissed.\*

For Appellant, *Thomas Erskine.*

For Crown, *His Majesty's Advocate (Henry Dundas).*

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\* NOTE.—This point came again to be considered in the case of Robertson and Berry in 1793, indicted for printing and publishing a seditious paper. The jury gave a verdict finding the printing and publishing, but said nothing about the felonious intent. Objections were stated to the verdict, but repelled; and, on appeal to the House of Lords, it was held that such an appeal was incompetent from the High Court of Justiciary in Scotland. About the same time the question was again raised in the noted cases of Muir, Palmer, Margorot, and others, tried for sedition; but without success, the Lord Chancellor and Lord Thurlow taking the lead in the discussion. Contemporaneously with these cases Mr. Adam (afterwards Lord Chief Commissioner) moved for a committee of the House of Commons, with instructions to consider the propriety of bringing in a bill to alter the law of Scotland in this respect, and assimilate it to the appeal in England by writ of error. The recent cases above mentioned, and particularly those of Muir and Palmer, entered deeply into the discussion; but, in a House partly composed of Fox, Sheridan, Wyndham, Wilberforce, Whitebread, Burke, and Sir Philip Francis, it was lost.

An appeal, however, is competent from a sentence of the Court of Session, wherever it has occasion to exercise its criminal jurisdiction in punishing forgery, or wilful falsehood and prevarication committed in any cause conducted before it. In the case of Carse (July 1784, *vide infra*) his sentence of imprisonment and the pillory, for prevarication and wilful concealment of the truth, was appealed to the House of Lords, and the objection taken by His Majesty's Advocate, that it was incompetent to appeal from such a sentence; but this objection was not sustained, and abandoned.

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(M. 10265.)

**ALLAN, &c.** **JANET ALLAN, Relict of JOHN CAMERON, late  
v.  
ROBERTSON,  
&c.** **of Carnyne, and her Children,** - } **Appellants;**  
**Messrs. ROBERTSON and Others, Creditors of  
RICHARD CAMERON, now of Carnyne,** } **Respondents.**

House of Lords, 15th May 1781.

**REAL OR PERSONAL—PROVISIONS TO WIFE AND CHILDREN.—Circumstances in which held, that these had not been made real burdens on the estate conveyed.**

**Jan. 28, 1761.** On the marriage of the appellant with John Cameron, her husband, they entered into a marriage contract, by which he bound himself to pay the appellant, in case of her surviving him, an annuity of £55. 11s. 1½d. per annum; and to the children of the marriage £3055 among them as provisions. And for the better security of these provisions to his wife and children, he "gave, granted, and disposed his estate of "Carnyne and others, to her in liferent, for her security "only of theforesaid liferent, and in favour of the children "of this marriage, towards payment and security to them in "manner above expressed" of their provisions.

The marriage took place thereafter, but no infestment followed on this deed, although it contained procuratory and precept of sasine. Several children were procreated of the marriage, and he then made additional provisions in favour of his wife and children, by three separate instruments of

**Sept. 28, 1771.** the same date. By the first deed he granted bond to his wife, providing an annuity of £100 per annum, free of all deductions. By the second, he granted bond of provision, giving £300 to each of his seven sons; and £600 to each of his three daughters. 3d, He executed a disposition, conveying his estate of Carnyne in favour of his eldest son Richard, providing that the said Richard should be bound and obliged "to satisfy and pay all my just and lawful debts, "deathbed and funeral expenses; and also to make payment to Janet Allan, my well beloved wife, and his mother, of the liferent annuity provided by me to her by the contract of marriage betwixt us, and that in terms of the said contract; and also of a further yearly annuity of 800 "merks, making in whole the sum of £100 sterling, payable "at two terms in the year, by equal portions, in terms of, "and conform to a bond of provision granted by me to her,

" of this date, and relative hereto ; and, likewise, to pay to  
 " the younger children procreate, or to be procreate of  
 " the marriage of me and the said Janet Allan my wife,  
 " the several sums provided by me to them, in a bond of  
 " provision executed by me, in their favour, of this date."

There was an obligation to infest "*under the burdens, provisions, reservations, and power and faculty before written.*" Also, a procuratory of resignation, and precept of sasine, setting forth, " Attour that Richard Cameron, my eldest son, and his foresaids, may be infest and seized in the lands particularly before disposed, *under the burdens, provisions, reservations, power and faculty before written,* I hereby desire," &c. to give heritable state and sasine, &c. of all and whole the several lands, but always "with and under the burdens, provisions, reservations, power and faculty before written, here also held as repeated *brevitatis causa*, but are nevertheless appointed to be engrossed in the infestment to follow thereupon, otherwise the same to be void and null." The above bond to the wife set forth, "with the payment of which annuity I have burdened my real estate, disposed by me to Richard Cameron, by disposition, of this date, and relative thereto;" but there was no corresponding clause in the bond to the children.

On John Cameron's death, Richard Cameron made up titles to his father by service, was infest in the said lands, upon a precept obtained from Chancery, proceeding upon retour of his special service. This sasine did not make mention of any burdens upon the lands, and the apparent object of making up the title in this way, was to avoid any such. But afterwards becoming insolvent in 1777, he took new infestment on the disposition of 1771, and in terms thereof, engrossed the burdens, under which it was granted, by particularly specifying the sums of money due to the appellants.

On his bankruptcy, the estate of Carnyne and others was brought to a ranking and sale; and the appellant and her children having previously obtained decree, for the annuity to herself, and provisions to the children respectively, sued out an adjudication thereon, and claimed that the estate might be preferably burdened with the payment of the annuity and interest of the provisions to the younger children. The question was, Whether the disposition of 1771, in favour of Richard Cameron, did create a *real burden* on the estate, so as to entitle to such preference ?

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&c.

July 19, 1780.

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The Court, on report of the Lord Ordinary, of this date, pronounced this interlocutor, "find that the provisions to 'the said widow and younger children, are not real burdens on the estate of Carntyne; and, therefore, refuse 'the petition." And, on reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought.

*Pledged for the Appellants.*—In order to constitute a real burden upon lands, the law of Scotland requires no particular form of words. It is enough, that the grantor has expressly conveyed the subject, under condition of the special burden mentioned. Here the subject, as well as the grantee, is charged with the burden of the annuity and provisions, and in such a way, that the deed and the record may give notice to all who deal with him, that the property is thus preferably charged. These burdens are appointed to be engrossed in the infestments to follow thereon, under the condition of nullity. The respondents say, that had such expressions as these been used, "that this disposition is granted with and under the burdens," &c.; or if to the obligation to pay, there had been added, "which debts shall be real burdens on the said estate," there could be no doubt that a real burden would have been created. But the words here are equally strong, because he conveys to Richard Cameron, "*with and under certain burdens.*"—He obliges himself to infest *under the same burdens*, and his precept of infestment is *under the same burdens*, with an express injunction, to engross these burdens specifically, in the infestment to be taken thereon, on pain of nullity. Infestment was taken thereon in 1777, specially enumerating these burdens, and the particular sums of money due the appellants; and it cannot impeach the validity of this infestment, or the real security thereby effected, that between the date of the disposition, and that of the infestment, the donee had become bankrupt.

*Pledged for the Respondents.*—The appellants are here endeavouring to establish an illegal preference over the estate of Richard Cameron, in fraud of his just creditors. The provisions in question were not made real burdens on the estate. The disposition of 1771 did not create any such real burden, and of course the infestment which followed six years after its date, could not do so. According to the law of Scotland, two things are requisite, in order to create a

real burden, 1st, It must be expressed in the deed, as a real burden on the *lands*, and not to create merely a personal obligation, or condition of payment directed against the grantee; 2d, It must be specially engrossed in the procuratory of resignation, or precept of sasine, which are the warrants for infestment; and also in the instrument of sasine or infestment itself. No unknown or indefinite incumbrance can exist as a real security,—every real security must be made manifest from the deeds themselves. And this especially in a question with creditors, and those who only claim family provisions under a disposition, in which no such burdens or incumbrances appear. The infestment which followed, specifying burdens that are not enumerated in the disposition, was therefore inept, as exceeding and going beyond its warrant.

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*DOUGLAS, &c.*

After hearing counsel, it was  
Ordered and adjudged that the interlocutors complained  
of be affirmed.

For Appellants, *Henry Dundas, J. Dunning.*

For Respondents, *Ilay Campbell, J. Anstruther.*

*JAMES CRAIG of Edinburgh, - - Appellant;*  
*Messrs. DOUGLAS, HERON, and Co. - Respondents.*

House of Lords, 17th May 1781.

**SALE—COPARTNERY—LIABILITY.**—Circumstances in which a sale of stock, completed and carried through by one body of directors and not the whole, was held to liberate the partner, who sold his stock to the Company, from all liability as a partner, though by the rules of the Company, the transfer behoved to be submitted to the whole three bodies of directors, and though the Company was insolvent at the time.

The appellant was originally one of the partners or shareholders of Douglas, Heron, and Company, bankers, Ayr, holding one share of £500 thereon. And it being a law of the Company, in order that any shares of stock offered in the market for sale by the shareholders, might be bought in by the Company, that the Company should have the first option of buying up the shares, to prevent a total discredit of the stock, the appellant gave intimation to the directors in Edinburgh of his intention to advertise his

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DOUGLAS, &c.** share for sale, whereupon the directors agreed to purchase the same for the behoof of the Company, and the appellant went to their bank-office, wrote a letter offering to sell his share for £400, with interest from the 15th May 1772, which sum he empowered the bank to retain, to extinguish *pro tanto* his cash account. The bank returned a letter accepting of his offer, and agreeing to place the price in extinction of his cash account. This was done accordingly, by an entry in the appellant's bank book, in the handwriting of the Company's accountant, thus :—

*Dr. Messrs. Douglas, Heron, and Co. in account with  
Mr. James Craig, Baker. Cr.*

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June 9. To my share of the Co.  
stock, with interest since  
15th May last, per agree-  
ment, £401 7 5

1772.

June 9. By bal. of last  
acct. £506.16s.

The Company of Douglas, Heron, and Company, had three branches; one in Edinburgh, one in Ayr, and a third in Dumfries. There were also three sets of directors. And the resolution of the Company, in regard to purchasing shares, provided "That it should be left to the *whole* directors, when "any proprietor means to sell out, either to admit a transfer "to the person to whom he proposes to sell, or otherwise to "purchase his share for behoof of the Company, and that all "such transferences shall be regularly entered and reported "to the next general meeting." The proposed transfer only came before the consideration of the Edinburgh directors, and not the *whole*, and no report was submitted of the transfer to the next general meeting.

In a few weeks after thus disposing of his share, the Company was thrown into difficulties and confusion by a money panic, and the question was, Whether the sale was finally concluded, so as to exempt the appellant from liabilities as a partner? The Company maintained that he was still liable as a partner—that the sale was not concluded, and that at the time of the sale the Company was bankrupt. In answer to this, it appeared that the bank went on doing business from 9th June 1772 to the spring of the year 1773, and that the reason why the transfer was not granted in the interval, arose from more important engagements calling their attention away from this matter; but, on 2d February 1773, this transfer, at the request of the directors, was signed by him, and handed over; and a settlement of the

transaction entered in the bank books, and reported at the next meeting thereof, the minute of which sets forth the same, and nothing was further heard of the transaction, until 1779, when the present action was raised against the appellant.

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CRAIG

v.

DOUGLAS, &amp;c.

July 11, 1780.

The Lord Ordinary assailed him from the conclusions of the action. But, on reclaiming to the Court, the Lords pronounced the following interlocutor:—" Find that no Dec. 8, — " bargain was completed between the Company of Douglas, " Heron, and Company, and the defender; and therefore he " still continues a partner of the said Company; and remit " to the Lord Ordinary to proceed accordingly." On re- Feb. 7, 1781. claiming petition, the Court adhered.

Against these two last interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The share which the appellant had in the Company of Douglas, Heron, and Company, having been sold several years previously to the date of this action, and the sale made in the most fair and deliberate manner with this Company, upon condition, expressed in the deed of transfer, that the Company were to relieve him of all the copartnery engagements, he cannot be obliged to restore the price then paid, or be subjected to any of the losses or debts due by the Company, as still an existing partner. And this action is no better than an attempt to set aside the sale because the Company concerns have turned out unsuccessful. There was no fraud—no unwarrantable or collusive dealing in the transaction. Every thing was fair and open, and concluded with the Company itself by its directors and managers, duly authorized so to transact, by a resolution of the general body of shareholders or company. Nor will it avail to assert that there is now no evidence of the agreement in May 1772; and to assert that when the transfer was completed in February 1773, the Company was bankrupt; because, 1st. The want of written evidence of the transaction in May 1772 is owing to its being given up and cancelled on delivery of the transfer in 1773; and, 2d. There exists no proof of bankruptcy at the time. The stop in June 1772 being merely a temporary expedient, the Company went on immediately for years thereafter. It is equally untenable now to object to the form of the transaction, founded on the directors having no powers to purchase without the consent of the whole directors, because the resolution was not so framed as to make the power

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CRAIG  
v.  
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to depend on the consent of the whole. It was not necessary, in addition to the consent of the Edinburgh directors, to get also the consent of the Dumfries and the Ayr directors. It was enough that the general resolution authorized and empowered each body of directors within their districts, to buy up such shares.

*Pleaded for the Respondents.*—The appellant must remain a partner, subject and liable to all its responsibilities, unless he can show that he has been liberated therefrom in the manner prescribed by the rules and regulations of the Company. That has not been done here, because the transfer stock was destitute of that evidence of completed sale, which was, in terms of the laws of the Company, requisite to make it binding on the Company. It was not in the power of the Edinburgh directors alone to bind the Company without the consent or approbation of the other two branches—namely, of Ayr and Dumfries. The resolution of the Company of 1770 was, “That it should be left to the *whole* directors, “when any proprietor means to sell out, either to admit a “transfer to the person to whom he purposed to sell, or “otherwise to purchase his share for behoof of the Com-“pany, and that *all such transferences shall be regularly en-“tered and reported to the immediate subsequent general “meeting.*” This was not done neither in regard to the consent of the *whole* directors, nor in reporting the transfer to the general meeting as there prescribed, and consequently the transfer was not binding on the Company. This strict rule is the more imperative, because in June 1772, when this transaction was thus entered into by the Edinburgh directors, the Company was insolvent, which insolvency, operating as a dissolution, necessarily superseded and suspended the resolution regarding the Company buying up shares.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed, and that the defender (appellant) be assailed.

For the Appellant, *J. Dunning, Robert Blair.*  
For the Respondents, *J. Wallace, Dav. Rae.*

*Note.*—This case not reported in the Court of Session.

1781.

WILLIAM WADDELL of Papperhills, - *Appellant;*  
JOHN RUSSELL of Bentfoot, - - *Respondent.*

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WADDELL  
v.  
RUSSELL.

House of Lords, 10th December 1781.

SERVITUDE OF MINERAL WELL—POSSESSORY JUDGMENT.—A party claimed a servitude over a mineral well in his neighbour's field, near the mutual fence dividing their properties, and alleged the use and possession thereof for time immemorial. The Sheriff sustained his claim as a servitude. On advocation the interlocutor was varied, so as to leave out any finding as to a servitude. Held in the Court of Session and House of Lords, that he was entitled to the possessory judgment, as to his use of the well, and to have access thereto by a stile over the stone wall.

The appellant and respondent were conterminous proprietors, having estates marching with each other. Near to the march, and almost in a line with it, there was a mineral well, *on the appellant's side* of the march, claimed by him as his exclusive property. In the several proceedings as to the repair and straightening of the marches, this right had never been disputed by the respondent. But afterwards, when a stone dyke was, by order of the Sheriff, ordered to be built at their mutual expense, as a march wall between the two properties, the respondent laid claim to a right of servitude in the well, and accordingly presented a petition to the Sheriff, praying that he had such a servitude; and that he ought to have access to it by a stile, made in the proposed new wall. This petition was amended by another praying to allow him to make a proper entry to the well, through the march dyke, at their mutual expense, or at his own. In answer, it was pleaded, that there could be no servitude of a medicinal well, as, from the nature and quality of the thing, it was quite inconsistent with a servitude—that the respondent had plenty of water within his own property, and that he had no more right to such a servitude, by merely resorting to this well, than the people from all quarters of the adjacent country had, who resorted to it in the same manner, because if he had, every person far and near would be entitled to a servitude over it on the same ground. The water, by its mineral quality, is not adapted to the uses of a dominant tenement. There can therefore be no real servitude over it, and the law of Scotland does not recognize a personal servitudo. The well is exclusively within the pro-

1781.

perty and enclosures of the appellant, who is therefore entitled to debar all access thereto.

WADDELL  
v.  
RUSSELL.

Mar. 24, 1778.

The Sheriff-substitute found "it averred by the pursuer, "and not denied by the defender, that he and his family "have been in the constant uninterrupted practice of taking water from the mineral well in the defender's property, mentioned in the pleadings: Therefore finds, that the pursuer has a servitude of taking water from the said well; and allows him, at his own charges, to put up a proper foot style across the march dyke, to be upheld by him at his own expense in time coming, so as he and his family may have a foot passage to the said well; and prohibits and discharges the said defender from troubling or molesting the pursuer and his foresaids, in the use of said servitude." In an advocation, the Lord Ordinary pronounced

Feb. 4, 1780. ced this interlocutor, "Remit the cause to the Sheriff, with this instruction, to vary his interlocutor of date 24th March 1778, by leaving out these words, "Therefore finds, that the pursuer has a servitude of taking water from the well."

On representation his Lordship adhered, explaining that Feb. 24, 1780. "the pursuer (respondent) was entitled to a possessory judgment, and that neither party have brought a declarator relating to the well." On reclaiming petition to the

July 12, 1780. Court, their Lordships adhered to the Lord Ordinary's interlocutor, after a proof adduced by both parties as to the use

Feb. 7 and 10, 1781. and possession.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—It being admitted that the property of the well belongs to the appellant, it is incumbent on the respondent claiming a servitude over it, not only to establish that a medicinal well is a proper subject of servitude, but also that the usage and possession had by him constitutes such; and that he still holds and enjoys that possession, in order to support a possessory judgment. Here nothing of all this can be established. A servitude of water from a well is clearly a rural servitude, *servitus aquæhaustus*, which, according to Erskine "is a right competent to a landholder of watering his cattle at any river, brook, well, or pond, that runs through or stands in his neighbour's grounds." The basis of such servitude is its use to the neighbour claiming it, but law will not authorize him to break into his neighbour's grounds, when he has abundance

of water in his own grounds, merely for the purpose of getting at a mineral water, which can be of little or no use to him. Such water cannot be made use of for family and domestic purposes, for washing linen, or for watering cattle, and therefore cannot be the object of a prædial servitude. Even supposing it capable of such, all claim of this nature was given up at the time of straighting the marches by the erection of the stone wall, which totally excluded the respondent, and in which he has acquiesced for many years without objection, and without claiming any such right. This at all events debars him from a possessory judgment.

1781.

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WADDELL  
v.  
RUSSELL.

*Pleaded for the Respondent.*—It is proved, and otherwise admitted, that the respondent's family has been in the uninterrupted possession of the well in question, from time immemorial, and this was enough to establish the right claimed, be the qualities of the water what they may. No apparent prejudice could possibly arise by the respondent's family continuing to use it. And the argument resorted to, from the peculiar quality of the water, as unfit for family use, but only useful as a medicine, and therefore not a subject on which a servitude could be constituted, ought to be disregarded, because the proof and admissions as to actual use by his family, was sufficient to confute this supposition.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with the following variation, (viz. 1st, that in the interlocutor of the Sheriff-substitute, of the 24th March 1778, the words (of said servitude) be left out: And the words (thereof) inserted instead thereof; And it is further ordered that the Court of Session in Scotland, do give direction to the said Sheriff-substitute to vary the said interlocutor accordingly.

For Appellant, *Henry Dundas, Thomas Erskine.*

For Respondent, *Alex. Murray, Dav. Rae, Will. Baillie.*

NOTE.—This case not reported in the Court of Session. The decision seems only to go the length of giving a possessory judgment, leaving the question of servitude open; which had not been regularly brought before the Court.

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[*Vide* Mor. p. 12820.]

**GRANT**  
v.  
**DUKE OF**  
**GORDON.**

SIR JAMES GRANT and Others - - - *Appellants* ;  
DUKE of GORDON, - - - - - *Respondent*.

House of Lords, 20th February 1782.

**CRUIVE DYKS—RIGHT OF FLOATING TIMBER DOWN A RIVER.—**

Held that the superior heritors on the river Spey, in which the Duke of Gordon had a right of cruive fishing, had a right of floating down the river rafts of timber, and that the cruive-dyke, built across the river to serve the Duke's fishing, could not be allowed to hurt or obstruct the free exercise of that right.

The Duke of Gordon's right of cruive-fishing in the river Spey had been disputed by the other proprietors having rights of salmon-fishing on the river; but the Duke's right thereto was finally fixed by sentence of the Court of Session, on remit to the House of Lords.

The appellants thereupon raised the present action, as proprietors of lands adjacent to the river Spey, concluding to have it found "That they had right, at all times, to send "floats of timber down the river, and to the navigation "thereof, in every way of which it was capable, and to have "every obstruction to this right removed; and that the "Duke of Gordon should be obliged to remove all dykes, "braes, and other bulwarks impeding the navigation; and "should be prohibited from erecting such for the future."

The plain object of this action was to get the cruive dykes destroyed, in which it appeared great alterations had recently been made, detrimental to the navigation of the river. Besides, the dykes at one time were composed of loose smooth stones, which gave way to the least force, so that the floats of timber, when coming down, met with little or no obstruction. Now, however, a solid and permanent massive wall was erected, reaching from bank to bank; and the appellants, therefore, complained of it as an obstruction, not only to the navigation of the river, but to their right of floating timber down the river.

Lord Gardenstone reported the case to the whole Lords, Jan. 18, 1781. who, of this date, pronounced this interlocutor :—" That "the Duke of Gordon has a right of cruive-fishing on the "river Spey; but that Sir James Grant and the other pur- "suers, superior heritors on the Spey, have right and title

" to pass with floats and rafts down the said river to the  
 " sea, from the 26th of August to the 15th May, and that  
 " from the 26th August to the end of March, they are en-  
 " titled to the exercise of the said right of floating indis-  
 " criminate, without any restriction or limitation, but that  
 " in the exercise of that right from the last day of March  
 " to the 15th May, the persons employed in the floating  
 " must give notice to the tacksman of the Duke's cruive-  
 " fishing, or their manager personally, or at the wauk-mill  
 " of Fochabers, now called the fishing quarters, between  
 " sun rising and sun setting, and that at least four hours  
 " before the floats are to pass, that the Duke's fishers, or  
 " others concerned in the cruives, may make a passage for  
 " the floats or rafts passing the cruive-dykes, and failing  
 " their opening a passage to the floats or rafts within four  
 " hours of such notice, allow the person attending the floats  
 " to open a passage for themselves on the cruive-dyke, and  
 " to pass freely without interruption."

The Duke reclaimed, and the Court pronounced this interlocutor:—"That the superior heritors are only to float  
 " from sun rising to sun setting; also that they are to pass  
 " the cruive-dyke *seriatim*, at the place pointed out to them  
 " by the Duke's fishers, who are always to make the said  
 " openings, so as to allow the floats to pass freely and con-  
 " veniently."

Against this interlocutor the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained  
 of be affirmed.

For Appellants, *Henry Dundas (Lord Advocate), Ilay Campbell, Jas. Grant, Wm. Grant.*

For Respondent, *Alex. Murray, Ar. Macdonald, Dav. Rae, J. Maclaurin, R. Dundas.*

**LORD MACDONALD,** - *Appellant.*

**NORMAN M'LEOD, Esq.** - *Respondent.*

House of Lords, 2d February 1781.

**RIGHT OF PROPERTY—POSSESSION—PART AND PERTINENT—ACCESSION.**—Certain rocks or islands on the coast lay between the estates of two parties. In neither of their rights or titles were there any express mention of those islands or rocks in dispute;

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**LORD  
MACDONALD  
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M'LEOD.**

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 LORD  
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but both claimed them, as part and pertinent of their estates, by virtue of possession exercised in pasturing sheep and carrying off kelp. The island was nearer to the appellant's estate than the respondent's, and he contended that it must have formed a part, at one time, of his land, by accession thereto: Held the proof of long possession on the part of the respondent, of said rocks or islands as part and pertinent of his estate, by pasturing sheep, and carrying off the kelp, and every other act of ownership of which they were capable, gave him the right of property to the same.

Mutual actions of declarator having been brought by the appellant's and respondent's ancestors, to settle the right to several kelp rocks, lying between the island of Uist, belonging to the appellant, and the island of Harries, belonging to the respondent.

The appellant's ancestors claimed the Barony of Macdonald, comprehending the lands of "North Uist, and nine "penny land and island of Halisker, in North Uist, together "with all and sundry privileges and immunities, as well by "sea as by land, used and wont, lying within the Lordship "of the Isles, and Sheriffdom of Inverness, by virtue where- "of, and of Sir James and his predecessors and authors, "their right and infestments of the said lands and Barony "of Macdonald, he and they had by themselves and their "tenants, past all memory of man, been in the peaceable "possession of the islands or rocks called Grinam and North "Rangus, being parts and pertinents of the farms of Kyhs "and Balliviephail, lying in the island of North Uist, and "that by pasturing of sheep upon, and cutting and carrying "off sea-ware from the said islands or rocks called Grinam "and North Rangus."

The respondent's ancestors declarator concluded, "That "by virtue of their rights and infestments, their predeces- "sors and authors of their lands of Harries, otherwise called "Ardmeank, pertinents thereof, and small islands thereto "belonging, he and they had, by themselves and their ten- "ants, been immemorially in the peaceable possession, as "their own undoubted property of the island of Bernera, and "the several small islands and rocks adjacent thereto, as "parts and pertinents of the same; and particularly of the "two islands or rocks called *Grinam, Sabay, and North* "Rangus, as proper parts and pertinents of the puruer's "said lands of Harries, and that by pasturing horse, nolt, "and sheep upon, and cutting and carrying off the sea ware "for manuring the land, making kelp from the said islands

" or rocks of Grinam, Sabay, and North Rangus, and by  
" using all other acts of property thereon. 1781.

These rocks or islands were situated on the coast, between Harries on the one hand, and North Uist on the other, only the rock called Grinam was locally situated nearer to the latter property.

LORD  
MACDONALD  
v.  
M'LEOD.

After the parties gave in an articulate condescendence of what they could prove, and had described the boundaries of their properties, the Lord Ordinary allowed both parties Mar. 9, 1766. a proof of their libel.

For the appellant's ancestors there were 23 witnesses examined, and for the respondent 41 witnesses. And memorials being ordered on the import of the proof, the Court pronounced this interlocutor:—" Find that the defender, July 17, 1771. " Norman M'Leod, has the exclusive right of property of " the island of Grinam, and rocks thereto adjoining, de- " scribed in the plan and survey of the subject in dispute " betwixt the parties, in manner following, viz. the island " of Grinam, marked No. 4; the rock called by the witnesses " for the pursuer *Skernasholadray*, and by the witnesses for " the defender Skerbuy Grinam, marked No. 2 on the plan; " the rocks close adjoining to the said island of Grinam on " the north, called by the witnesses for the pursuer the " Flows of Grinam, and by those for the defender Sker- " neich, and marked No. 3 on the plan; the rock called " *Shenskernarunuch* by the witnesses for the pursuer, and " by the witnesses for the defender Skernarunuck, lying to " the north, and adjoining to the said island of Grinam, " marked No. 5 on the plan; and the two rocks called by " the witnesses for the pursuer Skerbuinashealad and " *Shenskernacloichmore*, and by the witnesses for the de- " fender Skershullum-Vic-Vulay, and Shensker, lying to " the north of the Harries side of the island of Grinam, " and marked on the plan with the letters A. B.; the rock, " called by both parties the Flows of Grinam, marked No. " 6 on the plan; and the rock called by the pursuer " Skerbuishensker, and by the defender Skernashiola, " marked No. 8 on the plan; and find that the pursuer, " Sir Alexander Macdonald, has the exclusive right of pro- " perty of the whole other rocks in dispute by the parties, " viz. the rock called by the pursuer Skerad; the two rocks " called Skernascrave by the pursuer, and Skerinacher and " Skernaclachebrick by the defender, marked Nos. 7 and 9

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" on the plan ; the two rocks called by both parties Sker-  
 " vyeyir and Skernay, marked Nos. 10 and 11 ; the rocks  
 " called by the pursuer Skernaroan, and by M'Leod Skern-  
 " buie Votersy, marked No. 12 on the plan : the two rocks  
 " called by both parties North Rangus, adjoining to South  
 " Rangus, marked on the plan No. 14 : the small rocks  
 " called by both parties the Flows of North Rangus, marked  
 " on the plan No. 13, and the rock called by both parties  
 " the Beacon Rock, marked No. 15 ; and the rock called  
 " by the pursuer Skerbuinorestand, and by the defender  
 " Skerbuipolbacy, marked No. 16 in the plan, and decern  
 " and declare accordingly. And the Lords appoint the plan  
 " above mentioned to be marked in their presence by the  
 " President as relative hereto, and to remain among the  
 " warrants of the decree."

June 19, 1772. Both parties reclaimed, but the Court adhered.

Against these interlocutors, in so far as they decreed the property of the forementioned islands and rocks marked on the plan Nos. 2, 3, 4, 5, 6, 8, and A. B, to Norman M'Leod, Lord Macdonald brought the present appeal.

*Pleaded for the Appellant.*—It is admitted that neither party can shew any title or express right, by titles or plans, to this island of Grinam, and the adjacent rocks; but that it belongs to one or other of them as a part and pertinent of their respective estates. That from its vicinity to the appellant's estate of North Uist, from which, at full tide, it is not distant a gun shot, as the witnesses express it, and at ebb is easily accessible by foot passengers, the presumption is, that it was originally joined to the mainland by North Uist; and this is the more probable, as it appears from the proof that the sea has at that part made many encroachments on these islands, and has probably severed Grinam from the mainland of North Uist, and from every appearance of the general chart of these islands, as well as from the particular plan made in this cause, this presumption seems to be confirmed and established. But supposing it never to have been joined to the mainland of North Uist, yet as both parties claim it as part and pertinent of their larger estate, and as it is so near to the appellant's estate, and at the distance of several miles from the respondent's, the principles of general law, as well as of the law of Scotland, give the preferable title to the appellant, as appears from the authorities.

1781.

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LORD

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v.

M'LEOD.

*Pleaded for the Respondent.*—Where a subject, not specially contained, in either of their infestments, is claimed by two parties, as part and pertinent of their respective estates; the question, Whether it belongs to the one or the other, must depend upon the fact of possession had by either of them for such a time, and in such manner, as to denote its being considered his property. The appellant has shewn, first, no evidence that Grinam was a part of North Uist. 2d. The doctrine which he pleads does not apply to an island in the sea. 3d. Vicinity alone can neither give him, as proprietor of North Uist, a right to the island, nor prevent the proprietor of Harries from acquiring a right to it. 4th. It does not appear, and is not shewn, that the island of Harries once belonged to the family of the appellant, nor that Grinam made a part of it. It is by possession alone, therefore, that the right to that island can be determined. Though Sir Norman M'Leod and William M'Leod, for part of the period in which they possessed *Bernera*, under rights from the family of Macleod, were also in possession of Kylis, under rights from the family of Macdonald; this can be no reason why their possession of Grinam should not avail the respondent, it appearing from the evidence that they possessed it in right of Bernera, belonging to the respondent, and not of Kylis. Besides, the respondent has brought evidence of these subjects being possessed by his predecessors, then wadsetters and tenants in Bernera, by a proof reaching as far back as can in any case be expected, and in such a manner as clearly denoted their being considered as part and pertinent of that island. The argument of the appellant, founded on the vicinity to North Uist, of the subjects in dispute, is more than balanced by that proof adduced, because it is proved that the general channel of Grinam was the passage for all vessels of any burden, and the generally reputed march between the estates of Macdonald and M'Leod, and also because that Grinam bore the name of Grinamasheabay, to denote its connection with Shibay in Bernera; and further, because the proof establishes that Grinam and other rocks in dispute, all of which are connected with the island of Bernera, are part and pertinent of his property, and have been enjoyed as such, and possessed by him and his tenants, not as a servitude but as his absolute property.

After hearing counsel, it was

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FLEMINGSv.  
FLEMING.Ordered and adjudged that the interlocutor be affirmed,  
with £100 costs.For Appellant, *Ilay Campbell, Thos. Crosbie.*For Respondent, *Henry Dundas (Lord Advocate), B. W.  
M'Leod, J. H. Frazer.*

Unreported in Court of Session.

CATHERINE and WILLIAMINA FLEMINGS,	} Appellants;
daughters of WILLIAM FLEMING, Esq.	
deceased, - - - -	} Respondent.
MALCOLM FLEMING, Esq.	

House of Lords, 12th March 1782.

## ANTENUPTIAL CONTRACT—ENTAIL—FACULTY—JUS CREDITI.—

Parties, before their marriage, entered into an antenuptial contract of marriage, conveying the estate of the husband to himself, and the heirs-male of the marriage, reserving power to limit the said heirs, with and under such irritant and resolutive clauses as he should think proper. He afterwards executed an entail, in favour of the same series of heirs, prohibiting selling, disponing, or contracting debt, and even selling to pay the entainer's debt. In the contract, he bound himself to "do no fact or deed, whereby the "order or course of succession might be altered or diverted." He thereafter contracted debts to a considerable amount: Held, in a reduction brought of the entail by the heir of the marriage, as in contravention of the contract, that, in the special circumstances of the case, the entail was reducible, and reduced accordingly.

William Fleming, Esq. of Barochan, and Catherine Durham, entered into an antenuptial contract of marriage, by which William Fleming conveyed his estate to himself, and the heirs-male of the marriage; whom failing, to the heirs-male lawfully to be procreated of the said William Fleming, his body, of any other marriage; whom failing, to James Fleming, brother to the said William Fleming, and the heirs-male of his body; whom failing, to the heirs female to be procreated of the marriage between the said William and Catherine, the eldest heir-female always succeeding, without division; whom failing, to the said William Fleming, his heirs and assignees whatsoever, with power always to the

said William Fleming, with consent of the persons at whose instance execution was to pass on the contract, or major part of them in life for the time, and failing of them, with consent of two of the nearest of kin of the said Catherine Durham, and no otherwise to limit the said heirs to be procreate betwixt him and the said Catherine Durham, with and under such irritant and resolutive clauses as he should think proper. The contract further bound him to do no other deed, directly, or indirectly, whereby the order of succession might be altered or diverted.

There were two sons and two daughters born of this marriage, Malcolm, the eldest son, (respondent), Adam, since dead, and the appellants, Catherine and Williamina. James Fleming, his brother, had, in the meantime, died, and so had the trustees named in the above marriage contract, at whose instance execution was to pass. In pursuance of the power reserved to him in the above marriage contract, he, in 1761, executed an entail of the estate, setting forth, "with  
 "special advice and consent of the said Mrs. Catherine  
 "Durham, my wife, and Adam Cunningham Durham of  
 "Bonnington, and Isobel Durham, daughter of the said de-  
 "ceased Adam Durham of Luffness, and who are the two  
 "nearest in kin to the said Catherine, my wife, and their  
 "sister," &c. By this entail he limited the estate to the same series of heirs as in the contract. It contained prohibitions, and irritant and resolutive clauses, against altering the order of succession, selling, and contracting debt. And even prohibited to sell any part of the estate, for payment of the entainer's debts; while, on the other hand, the next succeeding heir was taken bound to pay these debts, within seven years, otherwise to forfeit the estate.

On William Fleming's death, in 1767, his eldest son, Malcolm, succeeded, and was infest upon the precept in the entail; but sometime thereafter he brought this action for reducing this entail, on the ground, 1st, That by the contract of marriage, his father was barred from executing an entail of the estate, the same being provided to the heir of the marriage; 2d, That this was not a due exercise of the power reserved in the contract, and had not the consent of the parties appointed to see execution pass upon the same. In defence, the appellants, substitutes in the entail, insisted that it was executed agreeably to powers reserved in the contract, and had the consent of the parties mentioned therein.

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 v.  
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 v.  
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The Lord Ordinary repelled the objection, that the proper consents were not adhibited to the entail, and the question then came to be, How far the entail thus made was executed in terms consistent with the powers in the person of the said William Fleming, reserved by his marriage contract or otherwise? It was stated by the respondent, in point of fact, that the estate at the entainer's death was only worth £300 per annum. That £3500 of the entainer's debt was still owing, and adding to this, the debts contracted by himself, the rent of the estate was more than exhausted by payment of interest and taxes. In point of law he contended that it was not in the power of his father to defeat the *jus crediti* right conferred on him by the antenuptial contract of marriage, but was bound, when he settled the estate on the heirs of the marriage, to allow it to descend *tanquam optimam maximam*, unimpaired by any gratuitous deeds whatsoever, limiting or encumbering it. The reserved power in the contract did not give express power to make an entail prohibiting selling, disponing, contracting of debt, or even selling to pay the entainer's debt. In answer, it was contended that the entainer's debts were not so great as here represented, and that, in point of law, the entail could not be set aside as *contra fidem tabularum nuptialium*, because it was executed in pursuance of powers reserved by the contract itself.

The Court of Session pronounced the following interlocutor : " In respect that William Fleming, the maker of the entail, stood bound by the contract of marriage libelled, to transmit his estate, which at his death amounted to about £300 Sterling per annum, to the pursuer, the heir-male of the marriage, free of debt; and that *contra fidem* of that contract, it is averred by the pursuer, and not denied by the defenders, that he had contracted debt to the amount of about £3000 Sterling, the interest of which amounted to the one half of the rents of the estate; which was likewise subject to his widow's jointure of £100 Sterling per annum, and that by the said entail, the pursuer, the heir male of the marriage, had no power to sell any part of the said estate for payment of the tailzier's debts; but on the contrary, was taken bound, as a condition of the entail, to make up the titles to the said estate by virtue thereof, and to redeem several adjudications even for the entainer's debts seven years before expiration of the legal thereof, though these adjudications might have been led in the

" tailzier's lifetime, and that there was no provision for redemption of special adjudications. Therefore, and on consideration of the other special circumstances of the case, they sustain the reasons of reduction, and reduce and decern." On reclaiming petition the Court adhered. July 14, 1781.

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v.  
FLEMING.

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—A settlement of an estate in a contract of marriage to the heirs *nascituri* of the marriage gives no more than a *spes successionis* in the children, and infers no more than an obligation on the father not to alter the order of succession gratuitously, and binds him only to leave the estate to descend to heirs of the marriage, *tantum et tale*, as it was in him at his death. Contracting debt, or selling a part of the estate, is no infringement of such an obligation, nor are rational deeds—gratuitous deeds might be so, but not his onerous debts,—and deeds which might wholly disappoint the heir. This being the law, the entail in question was a deed that he had power to grant. It contained of course prohibitions against selling or alienating any part of the estate, and an obligation to redeem adjudications; but these are leading clauses in all entails. No doubt, no power is given to sell any part of the estate to pay the entailer's debts; but this is not a ground at common law for setting aside the entail. And for this a remedy can be had from the legislature. It is said that he was bound to transmit the estate to the respondent *free of debt*; but no such obligation is either expressed in or implied from the contract of marriage. All that he is bound to there, is, to do no deed, directly or indirectly to alter the order of succession. He has not done such deed, because the entail does not alter the order of succession; on the contrary, it conveys the estate to the same series of heirs, and he never *covenanted* that the estate should descend *free of debt*. But the entail in question forms a part of the contract of marriage, because in the contract power is reserved "to limit the said heirs to be procreated betwixt him and the said Catherine with and under such irritant and resolute clauses as he shall think proper;" and the entail, proceeding upon a recital of the powers so reserved, makes those two deeds one.

*Pleaded for the Respondent.*—William Fleming had no power to execute the entail in question, because, by the previous contract of marriage, he settled the estate instantly on the respondent, the heir of the marriage; and thereby became bound to transmit the same to him free of debt,

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" and to do no fact or deed whereby the order or course of succession might be altered or diverted." The entail here was entirely subversive of that obligation, because, besides prohibitions against selling, alienating, and contracting debts, and obligation to redeem adjudication, the father reserves power to himself to sell and dispose of the estate, to contract debt, and burden and affect the same at pleasure; and even to alter the entail itself. But all this could only proceed upon a mistaken notion of his powers, and a total disregard of that *jus crediti* then existing in the heir of the marriage; because where a father, by his contract of marriage, settles his estate upon such heir, he is bound to transmit it to him unencumbered and unprejudiced by any gratuitous or even onerous deeds. "He is not only heir but quodammodo creditor to his father." 2. Although a reserved power to execute a deed limiting the heirs with irritant and resolutive clauses was contained in the marriage contract, this did not authorize a power in the father to burden the estate with debt; because he was thereby expressly taken bound "to do no act or deed" to defeat the purposes of the marriage settlement, and the power reserved must always be construed subject to the express obligations.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellants, *H. Dundas, T. Erskine.*

For the Respondent, *Ar. Macdonald, Dav. Rae.*

NOTE.—This case not reported in Court of Session.

(M. 7085.)

JOHN THOMSON, Jun., Merchant, Leith, *Appellant;*  
GEORGE BUCHANAN and Others, Underwriters, *Respondents.*

House of Lords, 13th March 1782.

INSURANCE—CONCEALMENT.—Circumstances in which it was held that where a letter of advice is concealed from the insurer, which only refers to matters of public notoriety, known to all insurance offices, as affecting the risk in insuring a particular voyage, that such concealment will not void the policy.

The appellant insured his ship *Gizzy* for Gibraltar with orders to the Captain to proceed from thence to Malaga,

and back to Leith, and to inform him on his arrival at Gibraltar, in order that an insurance might be effected on the vessel from Gibraltar to Malaga, and from thence to Leith. On arrival at Gibraltar, the captain accordingly informed the appellant of this by letter, and also acquainted him "that there is as much danger in going from here to Malaga, as coming from England here. I hear that merchants at Malaga wont ship any goods on board of English ships before they hear of a convoy to take them from here. I am going to write to Ferry to-morrow by post, to hear what he thinks of it; for there is a great many ships at Malaga that is chartered, and the merchants wont ship on board of them. They are shipping on board of Spanish ships for London. I shall write my wife by next post, and by that time I shall be able to give you a more full account of things how they are."

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Sept. 28, 1778.

Upon the receipt of this letter, the appellant applied at London and Glasgow to know the premium at which they would insure the vessel, but the Mediterranean being then swarming with French privateers, none would do it but at an exorbitant premium. After a good deal of delay, an insurance was effected with the respondents in Glasgow, at the high premium of 25 guineas per cent. The policy was for £600, and bore to be on the ship from Malaga to Leith, with liberty to call at Gibraltar, it being particularly mentioned that the last advice was from Gibraltar of the 28th September 1778; that the vessel had arrived there safe only the day before, and had a cargo to discharge, and if she sailed with convoy from Malaga or Gibraltar to England, and arrived safe, 5 per cent. should be returned.

The letter of advice above quoted was not shewn to the underwriters; and on the evening of the same day on which the insurance was concluded at Glasgow, the appellant received a letter at Leith, dated from Almeira, 21st October 1778, informing that the ship having sailed from Gibraltar to Malaga on 9th October, was taken by a French privateer, off Malaga, and carried into that port. This letter was immediately communicated to the insurers, and claim made for the loss; which being refused, action was raised before the Admiralty Court for payment.

In defence to this action, it was stated that the appellant ought to have laid before them the before mentioned letter from the captain, because it contained material intelligence which ought to have been communicated, but which was

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June 20, 1781.

concealed, and that the letter to the captain's wife was also concealed.

The above letter was produced, and the appellant examined, who deponed that he had received no other advice as to the ship, and Lamb, the captain, and his wife were also examined as to the letter alleged to be sent to her, which turned out to be a mistake, as none such was sent.

The Judge Admiral, after having allowed a proof, to shew that, prior to the date of the policy (26th Nov. 1778) the appellant knew of the ship having been taken as a prize, and this not having been proved, decerned against the insurers for payment of the sum insured. A suspension being brought of the Admiral's decree to the Court of Session, it came before the Lord Justice Clerk Ordinary, and his Lordship ordered informations with the view of reporting to the Court. The Lords, of this date, on considering these, "suspended the letters simpliciter."

Against this interlocutor the present appeal was brought.

*Pleaded by the Appellant.*—It is quite true that the party insuring must communicate to the insurers every fact within his knowledge *material* to the risk, and material to guide the latter in fixing the premium at which they will insure; but it was not necessary for the appellant to communicate the contents of the captain's letter, because the facts in the letter received were matters of public notoriety, known to every insurance office in the country, and already known to the respondents, as is proved by the high premium they took. The only fact which the letter communicates is the date of her arrival at Gibraltar. It communicates no other intelligence of additional risk or danger other than that which, from the war with France, was well known to exist. And the allusion in the letter to merchants not sending their goods in English ships without convoy, was plainly intended to show how unlikely it was that the ship would get a freight at Malaga, than any danger from the enemy; but the captain was evidently hazarding his own opinion, not so much upon actual knowledge of the fact, as upon mere speculation as to the dangers, because he closes by stating that he would write to Mr. Ferry for information. But to hold that this letter does not simply refer to the French privateers, and to the dangers necessarily arising from the war in which France and Britain were then engaged, facts already known to the respondents, is to subvert the whole meaning of the letter, and the contract between the parties.

*Pleaded by the Respondents.*—The suppression or concealment of material intelligence, whether fraudulent or not, vacates the policy. Insurance being a contract of good faith, the appellant was bound to communicate the captain's letter (which evidently represented the risk of the voyage greater than he had expected, and was written to guide him in the insurance,) in order to allow them to judge aright as to premium at which they would or should insure. He not having done this, and not having communicated its alarming intelligence, the respondents were deceived and induced to take a more moderate view of the risk, and to charge lesser premium accordingly, by which concealment the policy is void.

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WAUCHOPE  
v.  
YORK  
BUILDINGS CO.

After hearing counsel, Lord Mansfield moved that it be Ordered and adjudged that the interlocutor of the Court of Session be *reversed*, and the decree of the Judge Admiral, decerning for the sum in the policy, be affirmed.

For Appellant, *Henry Dundas, J. Dunning.*

For Respondents, *Ja. Wallace, Ar. Macdonald.*

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(Mor. 10,706.)

ANDREW WAUCHOPE and Others, - *Appellants;*  
YORK BUILDINGS COMPANY, - - *Respondents.*

House of Lords, 22d April 1782.

NEGATIVE PRESCRIPTION.—Party pleading it must have an interest.

For particular report of this case, see Morison, p. 10,706.

Circumstances in which the negative prescription was pleaded against four old bonds, but held not to apply, in respect that the party pleading it had no interest to plead the negative prescription.

The case was appealed to the House of Lords. After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *J. Maclaurin, Alex. Murray.*

For Respondents, *G. B. Hepburn, Ilay Campbell.*

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 LEGRAND  
 v.  
 STEWART.

 RICHARD LEGRAND, Esq. - - Appellant ;  
 MARIA STEWART, his Wife, - - Respondent.

House of Lords, 31st May 1782.

**DIVORCE—REMISSIO INJURIE.**—In order to found a relevant defence of *remissio injurie*, it must be proved that the offended party was in the *certain knowledge* of particular acts of adultery, such as would found a divorce, and nevertheless cohabited thereafter with the guilty party.

In 1770 the appellant was married to the respondent, but soon thereafter he gave himself up to low company, dissipation, and violence, to such a degree as that the respondent was forced to leave his house, her life being endangered from his violence, and to take refuge with her mother. Having somewhat reformed, she was induced to return to his society and house, on which occasion he executed a trust-deed of his estate in favour of his agent, for certain purposes, chiefly the payment of his debts and support of his family, and which bore this clause :—“And whereas my spouse has been obliged “to leave the house of Bonnington, and separate herself from “me, and was about to raise an action of divorce on the head “of adultery; but upon my granting these presents, and pro-“mising to amend my future life, she has agreed to come “home.” But the appellant returning to his former dissolute life, she was obliged to raise the present action of divorce against him on the head of adultery. His defence was, 1. That he was not guilty of adultery; and, 2. Supposing he was, the action was barred by *remissio injurie*, as the pursuer had cohabited with him after she had come to the knowledge of his guilt; and referred to her letters to prove her knowledge. These letters having been produced, the

Nov. 23, 1781. Commissaries, of this date, pronounced this interlocutor :—

“Find the defence of reconciliation not proven by the let-“ters produced; find the alleged cohabitation not relevant “to bar the present divorce, unless the pursuer at the time “was in the knowledge of her husband’s adultery: And or-“dain the defender to condescend whether he offers to “prove that fact, and by what mode of proof.”

Dec. 11, 1781. They afterwards found “the evidence condescended on “by the defender not sufficient to instruct the pursuer’s “certain knowledge of the defender’s adultery, during the “period of the cohabitation urged as a preliminary defence “against this action, and repel the defence, and allow the

"pursuer proof of her libel." On reclaiming petition, the

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Commissaries adhered.  
 An advocation being brought, the appellant chiefly founded on the deed and the clause therein above quoted, which, he contended, proved her previous knowledge of the injury. To which it was answered, that this deed was executed by himself—that she was no party to it, and quite ignorant of its contents or its existence, and did not prove that she was then in the knowledge of the adultery.

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The Lord Ordinary pronounced this interlocutor:—“ Re- Mar. 16, 1782.  
 “ fuses the bill, but remits it with this instruction, that the  
 “ Commissaries repel the defence of *remissio injuriae hoc  
 statu*; and, before further answer, allow the pursuer a  
 “ proof of her libel, and the defender a conjunct probation  
 “ in common form.”

Proof being taken, and six witnesses being examined, the defender's guilt was established in the clearest manner. But the appeal to the House of Lords of the above interlocutors was then resorted to.

*Pleaded for the Appellant.*—The party who sues for an action of divorce ought at least to come into Court with clean hands; but here the respondent, though she states the appellant to have been going on in a continued train of guilt from 1772 downwards; though she swears she had a secret conviction of his crime for several years, and though she actually instructed a proctor in 1778 to raise an action of divorce, yet was pleased in that year to make up her peace with him for a sum of money and good settlements, and thereupon came home. This deed, and the letters taken in connection together, at once prove her previous knowledge. And the injury being once forgiven, and cohabitation following upon that reconciliation, was a complete bar to the action. Separately, the vague and general terms of the libel admitted to proof are extremely exceptionable. It sets forth, that during the years 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, and 1780, and part of the year 1781, and upon one or other of the days of the months of the said years, the appellant has been guilty of adultery in Scotland and in Ireland, particularly with seven women named. These women are admitted as all of bad fame, and proposed to be witnesses, so that it was impossible to say whether the vagueness of the libel, or the evidence offered, was the most exceptionable.

*Pleaded for the Respondent.*—In actions of divorce on the

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head of adultery, it is an incontestable point of law, that if the party offended forgive the injury to her, in the full knowledge of the offence, and is in possession of the evidence sufficient to prove it, this amounts to an implied forgiveness, and such forgiveness, express or tacit, will be a sufficient bar to the action. But, in order to found this objection, it must be clearly proved that the party was in the *certain* knowledge of the adultery, and of its particular acts, and nevertheless cohabited with the guilty party, as it is only cohabitation, after a wife is possessed of this *certain* knowledge of the particular acts of adultery, which imports that *remissio injuria* which in law bars the action. In the present case, there is no such certain knowledge proved; and the deed granted by himself in 1778 cannot be construed into a *remissio injuria*, and so cannot be evidence of her knowledge of its contents; but it is needless to refer to it, because the acts of adultery proved were committed long posterior to that deed. And during the respondent's cohabitation with the appellant, she did not know of any particular acts of adultery committed by him, which could be the foundation of a process of divorce.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *G. Hardinge, T. Erskine.*

For Respondent, *Alex. Murray, Dav. Rae*

*Note.—Not reported in the Court of Session.*

[M. 12,683.]

ALEXANDER MORE, - - - - - *Appellant;*  
 JANET M'INNES, Widow of Captain FAIRBAIRN, }  
 late of the 62d Regiment of Foot, - - - } *Respondent.*

House of Lords, 25th June 1782.

CONSTITUTION OF MARRIAGE.—Circumstances in which a written declaration of marriage, written after pregnancy, was not held to constitute marriage.

The appellant, while living in Aberdeen with his father, and then very young, had become acquainted with the respondent, who passed as an officer's widow. He was only

24 years of age, and she was 37. It was further stated that she visited at his father's house, and he was in consequence drawn into a connection with her, which took place entirely unforeseen and unpremeditated on his part. One night in the month of February 1780, after having supped at the same place, he happened to see her home to her lodgings, when certain unexpected advances on her part encouraged him to take liberties, and, after an almost immediate temporary surrender of her person, he was that night admitted to her bed. He afterwards, as he alleged, received numberless favours, by invitation, of the same kind, the consequence of which was pregnancy. When she communicated to him her situation, she did not then seek or solicit marriage, or any promise or acknowledgment of marriage; but proposed a scheme of going to London, in order to be delivered with more secrecy, and sought money for that purpose. She then changed her mind, and proposed in November to go to Edinburgh, and asked money to defray expense. He gave her £8, and a diamond ring to sell, being all he had. By the advice of her friends, this plan was abandoned, and a scheme laid to entrap him into a marriage. One of these friends advised her to go home to her brother's in the country; but, as he would be offended, the only thing to appease and satisfy him, was for her to obtain a letter "*acknowledging*" her to be his wife. She brought a draft of this letter previously prepared. It commenced and ended with "My dear and loving wife," but these were deleted, as the appellant would not consent to them, and the letter below so altered was signed by him.

"Mrs. Fairbairn, I hereby acknowledge that you are my  
"lawful wife, and you may, from this date, use my name,  
"though, for particular reasons, I wish our marriage kept  
"private for some time; and always am, Madam, your most  
"obedient,

ALEXANDER MORE.

"Aberdeen, 1st May 1780."

The letter, though granted in November, when she was far gone in her pregnancy, was antedated in the draft, and copied exactly as it stands in the original, which was obviously devised in order to make the acknowledgment *anterior* to the pregnancy. But this was not all. Her friend, Captain Grant, to whom she was indebted for this plan, formed another plan, in conjunction with her brother, of having this followed up by actual celebration, after having been refused a second letter more to their wishes. Being then in the country, he was followed there by Captain

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Grant and her brother, in order to compel him to go through the ceremony of solemnizing the marriage. He was overtaken by them, and carried to a village called Udny, whence his own friends, having heard of the scheme, rescued him, and carried him off in a post chaise to Aberdeen. In these circumstances, the respondent brought the present action of declarator of marriage, founding on honourable courtship, and stating, that from professions of love she had consented to marry him, but he being then dependent on his father, thought it necessary to keep the matter secret till he could obtain his father's consent, "but in the meantime granted an explicit acknowledgment of marriage in writing; assuring the pursuer that it was equivalent, in every respect, to a marriage celebrated in the most formal manner in the face of the church, (*i. e.* the letter above quoted.) And being in the confidence that she was the married wife of the said Alexander More, and relying on his solemn promises and engagements, yielded to his earnest solicitations, and gave herself up to his embraces, and from henceforth he had free access to her person as a husband." In defence, courtship was denied, and it was also denied that any proposal or promise of marriage had ever been given by him, or passed between them; and that the letter was a plan adopted by her friends, after her pregnancy, to inveigle him into a marriage, but that it bore a false date. It is founded on as a promise or acknowledgment of marriage, but it was only granted in reality to serve a different purpose, namely, to screen her situation. The pursuer offered no evidence but the defender's letter, and his judicial declaration.

July 2, 1781. The Commissaries found the marriage proved. On application the Lord Ordinary refused the bill; whereupon the Dec. 19, — appellant reclaimed to the Court, who adhered to this judgment.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pledged for the Appellant.*—Marriage must either be completed with the legal solemnities *ex facie ecclesiae*, or attended with such circumstances as will authorize a court to interpose. Here it is not pretended there was any regular solemnization of marriage; and the written acknowledgment founded on to supply the place of regular marriage, cannot establish even an irregular one, because it was a written acknowledgment, extorted from the appellant after a criminal intercourse had taken place between them. It was granted to serve a particular purpose at the time, she being then

pregnant. And the *evidentia rei*, from its false date, shows that it was not a deliberate act of the will, but the effect of fraud and intimidation, as she demanded it under the threat that unless it were granted, her brother and Captain Grant would come and force him to grant it, and would, besides, disclose the whole connection to his father. By the law of Scotland, nothing less than a deliberate consent, mutually declared, and consummation following upon it, can establish the relation of husband and wife. There are no such circumstances here. The respondent's whole case rests upon the letter obtained of the appellant, bearing a false date, and under circumstances which at once show that considerable influence and terror, amounting to violence, had been used; yet he did not copy the draft as sent him; he altered it in most important particulars. Besides, such a letter is always to be viewed only as an article of evidence, the fact of the contract is a different thing. So assured was the respondent herself that it was not sufficient as very marriage, that her friends soon thereafter resorted to the plan of forcing an actual celebration. There being, therefore, no promise or acknowledgment, with subsequent copula, and no cohabitation proved, or attempted to be proved, after the granting the above exceptionable document, the marriage is not established.

*Pleaded for the Respondent.*—By the law of Scotland marriage is constituted by the *de presenti* consent of the parties acknowledging each other to be man and wife, without the intervention of any solemnity. The deliberate acknowledgment here establishes a marriage passed antecedently betwixt the parties. The phrase used, "I hereby acknowledge that *you are* my lawful wife," necessarily imports this, and which simply meant that they had been long married together. The respondent never promised to return this letter, nor was it granted to serve a mere purpose. The circumstances attending the granting of this letter of acknowledgment are quite inconsistent with the smallest degree of concussion having taken place. No one was present but themselves when he wrote and delivered it: and it is pure invention to allege that it was the fear of her brother, Mr. M'Innes, that induced him to give it, for at that time the whole affair was unknown to her brother. But even supposing this letter was not the acknowledgment of a previous marriage, yet as a private declaration of a marriage *de pre-*

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*senti*, entered into and accepted of by the wife as such, it was sufficient to constitute marriage, though no copula had afterwards happened betwixt them, the maxim being, that *consensus non concubitus facit matrimonium*. And supposing the letter only a written promise of marriage *de futuro*, still this would be sufficient, taken in connection with the subsequent copula, which the appellant has not ventured to deny took place after granting the letter.

After hearing counsel,

And due consideration had of what was offered on either side in this cause, the pursuer not having alleged, in the original libel or subsequent condescendence, any marriage or matrimonial contract previous to the acknowledgment mentioned in her libel, as dated on the 1st May 1780, but written in fact in the latter end of November following; and no proof of that, or any other circumstance of the transaction having been produced in the cause, but, from the judicial examination of the defender, whereby it appears that such an acknowledgment was not given by the defender, or accepted by the pursuer, or understood by either, as a declaration of the truth, but merely as a colour to serve another and a different purpose, which had been mutually concerted between them; and other circumstances of the case concurring to prove the same thing; it is declared that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and the defender; and it is therefore ordered and adjudged that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the Court of Session do remit the cause to the Commissaries with directions to find, that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and defender, and to proceed accordingly.

For the Appellant, *Henry Dundas, Ilay Campbell, J. Douglas.*

For the Respondent, *A. Macdonald, Dav. Rae, G. Buchan Hepburn.*

<b>DUKE OF QUEENSBERRY,</b>	-	-	<i>Appellant;</i>	<b>1783.</b>
<b>SIR WILLIAM DOUGLAS, Bart.,</b>	-	-	<i>Respondent.</i>	<b>DUKE OF QUEENSBERRY</b> <b>v.</b> <b>SIR W. DOUGLAS.</b>

**House of Lords, 30th April 1783.**

**WILL—INTENTION.**—Circumstances in which a deed declaring an intention to settle £16,000, sustained as a sufficient obligation binding on the heir.

The respondent's father having become insolvent, the late Duke of Queensberry, out of respect for the family, interposed, with the view of saving it from ruin. The respondent's father's debts almost equalled the value of his estates, and his creditors being urgent, the Duke took a conveyance of the estate, and in return advanced £30,000 to pay off these debts, having it in view to sell the estate again, and after reimbursing himself, to pay the surplus to the family.

The estate of Kelhead, which belonged to the family, was afterwards sold accordingly for £36,000.

It would appear that the Duke had repeatedly expressed his intention of giving the family in gift a large sum, or at least to bestow all the amount of his demands on the Kelhead estate, on Sir William, in order to re-establish the family, with which he was related ; and this was expressed in letters as well as verbally. Mr. Macconochie offered to purchase the estate under certain conditions as to the terms of payment. When the transaction in regard to the sale of the respondent's estate came to be adjusted, the Duke then residing in England, had sent up to him a deed drawn in the Scotch form, by which he was to signify his acceptance of the offer made for the estate, and also his agreement to the terms of payment proposed, viz. £20,000 at the term there specified, and £16,000 thereafter. The deed in regard to May 1, 1778. this last sum proceeds thus: “ And also for payment to me “ of the further sum of £16,000 at the term of Martinmas “ 1782, with interest in the meantime at the rate of 4 per “ cent. per ann. to the said term of payment, and with inte- “ rest at 5 per cent. thereafter during the nonpayment: *And* “ *as* my intention is, to settle and secure the last sum, at least “ *as* much thereof as my claims against the estate of Kelhead “ shall amount to, over and above the said sum of £20,000 “ upon the said family of Kelhead, I hereby authorize and ap- “ point the said George Muir to make out and settle the ac- “ counts of his intromissions with the rents of the said estate

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" of Kelhead, with all convenient speed, and to ascertain the  
 " exact sum due to me thereon ; and thereafter to make out a  
 " settlement by me of what shall be due to me over and above  
 " the said sum of £20,000, to and in favour of the said Wil-  
 " liam Douglas in liferent during all the days of his life, whom  
 " failing, in favour of the heirs male of his body, whom fail-  
 " ing, in favour of the heirs male of the family of Kelhead for  
 " the time being, in fee ; but declaring that the same shall be  
 " revocable by me at pleasure ; and that no part of the said  
 " principal sum nor interest shall be affectable by the debts  
 " or deeds of the said William Douglas, or of Sir John Dou-  
 " glas, or of any of the subsequent heirs.

The Duke died in October of the same year 1778, without having executed the settlement referred to in this deed ; and the question raised by the respondent in the present action was, Whether the above deed of 1st May 1778, did not amount to an obligation binding upon the heir of the Duke, so as to entitle him to compel implement and payment of the £16,000 ?

Jan. 18, 1782. The case was reported by the Lord Ordinary (Lord Hailes) on informations, and the Court pronounced this interlocutor : " Find, that in terms of the agreement entered into between the late Duke of Queensberry and Mr. Macconochie, as trustee for the pursuer Sir William Douglas, the said Sir William Douglas and his children have right to the £16,000 in question, prefer them thereto for their several rights and interests, and remit to the Lord Ordinary to proceed accordingly."

Aug. 7, 1782. On reclaiming petition against this interlocutor the Court adhered " to the interlocutors reclaimed against, and refuse the desire of the petition ; and remit to the Lord Ordinary to hear parties on the nature and terms of the conditions under which the sum in question is to be settled on the respondent and his children, and to do therein as he shall see cause."

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The concluding part of the instrument of 1st May 1778, upon the construction whereof this question arises, is an order by the late Duke of Queensberry to his attorney to prepare a draft of a deed for settling a sum of money upon the respondent and his family, introduced by some superfluous words, importing that such was his Grace's intention at the time ; but, by the law of Scot-

land, no voluntary declaration of an intention to do or to give, is to be construed or taken as the actual deed or gift. Even signed instructions to make a will, or a memorandum, specifying the person's intended disposition of his estate in the clearest terms, can have no effect, though the law regards intention, and dispenses with forms in the case of wills more than any other writings. The legal succession cannot be barred but by words denoting a clear, immediate, direct and complete alteration of its course. Intentions to be executed at a future time, however declared, are presumed to have been changed, if the thing be not actually done—a presumption which no circumstances can redargue. Thus the late Earl of Morton, having by his will appropriated a sum for his younger son, but having occasion afterwards to change the security, while that transaction was going forward, signified repeatedly, and in the clearest terms, by letters to his agent, that the money was to be destined and vested in that son's name, and ordered that deed to be prepared accordingly. Such a deed was sent him, and actually signed, but it was tested informally, and it was held that it could not prejudice the heir-at-law's rights, and was void as against him.

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DUKE OF  
QUEENSBERRY  
*v.*

SIR W. DOUGLAS

Douglas *v.* E.

of Morton.

Jan. 21, 1773.

The doctrine that a deed or actual gift was necessary, prevailed both in the Court of Session and the House of Lords in the case of Duke of Hamilton *v.* Douglas, *vide ante*, p. 449. The Duke had executed a revocation of certain deeds, *to the end that his estates might descend to his heirs male*: there could be no doubt as to his intention; but it was held ineffective, as not containing any dispositive words. The rule of equity, that what one undertakes to do, shall be held as actually done, has no relation to this case, for there was no undertaking, promise, or obligation on the part of the Duke of Queensberry to settle the money in question upon the respondent and family.

*Pleaded for the Respondent.*—The avowed and invariable object of the late Duke of Queensberry, in accepting of a trust conveyance to the estate of Kelhead, and taking it under his own management, was the re-establishment of that family. It was for some time known that there would be no reversion from the estate itself to effect this object, and therefore the only hope was through the Duke's bounty. Accordingly, the Duke determined to settle upon them the sum in question. The deed of 1st May 1778 has declared this to be his will in terms so explicit, that no ingenuity

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can darken or illustrate them. Besides, every consideration of reason or justice urge the fulfilling of the Duke's will. Were it to be ineffectual, not only would his Grace's great object for a series of years before his death be defeated, but the tendency of his interference in the affairs of this family would be to accelerate its ruin—the ruin of a family nearly related to the Duke. While it is quite obvious that a declaration of the Duke's will was all that was necessary in this case. It is admitted that the Duke held the estate of Kellhead in trust for the family, and the deed in question may be considered as the terms on which the Duke surrendered that trust. For this no formal deed or technical language was necessary. There was no heritable estate in question; and the Duke not only declared his will in terms the most explicit, but he did so in a solemn and formal writing, regularly executed with all the forms required by the law of Scotland to give legal effect to any deed. It was written on stamped paper, signed before witnesses, and duly tested in terms of law. This declaration of the Duke's will was not only contained in a solemn and authentic deed, but it was part of a mutual contract between his Grace and Mr. Macconochie, acting as trustee for the respondent, and contains mutual obligations on the parties. A part of that contract was the re-establishment of the family in the manner set forth, and after being delivered to and accepted by Mr. Macconochie, it could not be resiled from; and the settlement of £16,000 being a part of that deed, is thereof obligatory on the Duke's heir. Besides, in the disposition thereafter granted to Mr. Macconochie, the Duke agreed to warrant the conveyance against a probable eviction of the heir as to part of the estate, by stipulating that the heir of Douglas challenging should forfeit the £16,000.

After hearing counsel, it was  
Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *L. Kenyon, Alex. Murray, Ja. Wallace,  
Ilay Campbell.*

For Respondent, *Henry Dundas, Robert Blair.*

Not reported in Court of Session.

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[M. 1610.]

Messrs. HODGSON & DONALDSON, Merchants, } *Appellants;*  
 London, - - - - }  
 THOMAS BUSHBY of Ardwell, - - - - *Respondent.*

HODGSON, &c.  
 v.  
 BUSHBY.

House of Lords, 12th May 1783.

**BILL—NOTICE OF DISHONOUR.**—Where the holder of a dishonoured bill makes diligent inquiry at the former residence of the holder and indorser, for the purpose of intimating the dishonour, but cannot find him, and does all in his power to intimate dishonour to him, the recourse is not lost against him.

A bill was drawn by the respondent, dated London, 3d June 1779, for the sum of £454. 2s., payable two months after date, on Benjamin Graham, merchant, London, acceptor per procuration of John Hodgson, and indorsed by the drawer (respondent) to the appellants.

When the bill fell due it was not paid by Graham the acceptor, and was in consequence protested. And on inquiry Aug. 6.

at Jermyn street, where the appellants were informed Mr. Bushby, the drawer, resided, for the purpose of notifying to him the dishonour of the bill, they could learn nothing of him, other than that he had left the place some time before the bill fell due. They inquired at Mr. Hodgson, the party who signed per procuration of Graham the acceptor, but the information from him was, that he could not say whether he was then in town, in the country, or in Scotland.

Hodgson, on the 11th August, paid for Graham the acceptor £100, in part payment, but did not communicate, or declined to communicate, where the respondent was to be found. Aug. 11.

Eight days after the bill fell due, it was communicated to the appellants that the respondent had retired to Dumfriesshire, where he had a small estate, whereupon the bill was sent to their agent in Edinburgh, who raised diligence upon it, and brought an adjudication against the estate. The defence set up was, that the appellants were barred from recourse on the bill, 1st. In respect they had not notified the dishonour to him within three posts; and, 2d. In respect of giving delay to the acceptor and taking partial payment from him.

Of this date, the Lord Ordinary repelled the defence Feb. 17, 1781. pleaded by the said Thomas Bushby, and adjudged, decern-

1783.      ed and declared, in terms of the libel; and to this interlocutor, on reclaiming petition, the Court adhered.

**HODGSON, &c.**      On second reclaiming petition the Court found, "that no  
v.

**BUSHBY.**      " recourse lies against the defender, as drawer and indorser  
July 3, 1781. " of the bill," and a further petition against this judgment  
July 19, 1781. was refused.

**Dec. 3, 1782.**      Against these last interlocutors the present appeal was  
brought.

*Pleaded for the Appellants.*—The bill was regularly negotiated. The bill fell due on 6th August 1779, and was on that day regularly protested for non-payment, at the house of Mr. Graham the acceptor, which was the place of the actual residence of the respondent, and the appellants immediately made inquiry at Jermyn Street, where they had been informed the respondent resided, in order to notify the dishonour to him, and failing finding him, they made every inquiry and diligent search in order to notify the dishonour. Having done this, and the respondent having not left any information where he was to be found, recourse still lay upon the bill against the drawer and indorser, the more especially, as when they did learn, eight days after the protest, that he had retired to Scotland, they immediately sent the bill and protest to Scotland, to raise diligence against him there. In these circumstances, the respondent having done every thing in his power to notify the bill, that in law is held sufficient, it must be held as duly negotiated. Besides, this is an inland bill, in regard to which it is established law, that the drawer and indorser of such a bill is bound to the holder in all circumstances, and the want of protest, or due negotiation, cannot destroy this recourse.

*Pleaded for the Respondent.*—That the bill here was not duly negotiated. It lay, after being protested, in the appellants' hands for some time, without any notification, and even without any inquiry, and when they did receive some cue to the respondent's residence, they did not even then intimate the dishonour until the 21st of August, a term far beyond that to which the time of notice of dishonour is limited.

After hearing counsel,

**LORD MANSFIELD,**

" My Lords,—" A holder of a bill must give notice of the dishonour to the drawer or indorsers, within a reasonable time; but what was a reasonable time depended upon a multitude of circumstances. In the present case, the holders had done every thing incumbent on them. They had reason to hold Bushby, by his leaving London

without providing for the payment of the bill, and leaving no notice where he was to be found, to be a fugitive bankrupt, or swindler. The single question was, Whether, on hearing he was somewhere about Dumfries, they should have sent a letter to that place, or if they did right in writing to Edinburgh ? As he lived at a distance from Dumfries, they had reason to think the notice would reach him by writing to Edinburgh as soon as by trusting to the postmaster of Dumfries forwarding a letter. It was impossible to say they had not been as diligent as the circumstances of the case permitted. They were certainly obliged to use all diligence, as every holder of a dishonoured bill is, to give notice to the drawer or indorser."

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" As to the second defence. " If the holder of a dishonoured bill gives an hour's delay to the acceptor, he liberates the indorser ; but in this case, the bill was regularly protested ; and taking the partial payment some days after, was as much for the benefit of the drawer as the holder. The doctrine, that accepting a partial payment from the acceptor at any time *ipso facto*, frees the indorser, is neither founded on law nor reason. I therefore move a reversal of the judgment in this case."

It was ordered and adjudged that the interlocutor complained of be reversed ; and the interlocutor of the Lord Ordinary and of the Court of 3d July 1781 be affirmed.

For Appellants, *L. Kenyon, Henry Dundas.*

For Respondents, *Ilay Campbell, J. Anstruther.*

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VOLKERT HENDRICKS, late Master of the Ship  
Katherine of Amsterdam, and PETER WIL-  
LEM VAN LANKERN of Amsterdam, Merchant, } *Appellants* ;  
and the Owners of the said Ship Katherine  
and her Cargo, - - - - - }  
Wm. CUNNINGHAM, Merchant, Glasgow,              *Respondent.*

House of Lords, 2d May 1783.

**CAPTURE — JURISDICTION.** — Circumstances in which held that a Dutch vessel, while coming from a French colony, with the produce of that island to Amsterdam, was held to have been illegally captured as a neutral, neither the vessel nor the cargo, nor her papers, shewing that she was an adopted French vessel. Opinion indicated, though the objection to the competency was waived, that the Admiralty Court of Scotland had no jurisdiction to try such a question, but that it belonged to the High Admiralty Court of England.

The appellants were natives of Holland, and their ship,

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**HENDRICKS,**  
&c.  
v.**CUNNINGHAM.** *subjects of France*, previous to the commencement of hostilities with Holland.

the Katherine and her cargo, both belonging to them, were captured by the Bellona privateer, belonging to the respondent, a merchant in Glasgow, under a license which commissioned her to make reprisals against the ships of the *subjects of France*, previous to the commencement of hostilities with Holland.

There had been existing treaties of alliance between Great Britain and Holland, and it was alleged by the appellants that this capture was a violation of these existing treaties, particularly the marine treaty of 1674.

The Katherine sailed from the Texel with her cargo, and all her papers and instructions directed to the Dutch settlement of Curaçoa in the West Indies. Her instructions were to return directly from thence, without any other power to go to any other port. Instead of this, when she arrived at Curaçoa, finding the market glutted with a great part of the goods of which her cargo consisted, he landed the consigned goods, and after attempting sale of the others, he was obliged to look out for a market at some other port in the West Indies. Accordingly he sailed from Curaçoa to Cape François, in the island of St. Domingo, and there delivered her cargo to Monsieur Lambert, a French broker, having, previous to sailing from Curaçoa, obtained from the governor a clearance "for the French colonies, and from thence to Amsterdam," which clearance ascertained the kinds, quantities, and values of the goods on board, and consisted chiefly of provisions.

With the nett proceeds of the sale of her cargo, he purchased a cargo of sugar, coffee and hides, which he shipped in the Katherine, paid duty as a foreigner, and sailed direct from Cape François to Amsterdam, when, in the course of her voyage, she fell in with the Bellona privateer, and was captured by her. The captain of the privateer was shewn the ship's papers; his passport from the government of Amsterdam; ext. from the Admiralty Court at Cape François, of the entry of the cargo at that port, with the account of sales thereof, and likewise with the invoice of the home cargo, docqueted by Mons. Lambert, to show that the Katherine and cargo were the property of the appellants, and that the cargo was not *French property*, but he would not be satisfied. The Katherine was taken as prize and brought to Glasgow.

On arrival of the privateer at Port Glasgow a petition was presented to the Judge Admiral by the owners, setting

forth the whole circumstances, and concluding that the ship  
and cargo had been lawfully seized as prize, praying the  
same might be condemned as such. While the appellants,  
on their part, brought a counter action, to have it found  
that the ship and cargo were their property, and being the <sup>CUNNINGHAM.</sup>  
property of neutrals, and of subjects belonging to Holland,  
and not the property of a subject of France, or French pro-  
perty, were not liable to capture, and praying the ship and  
cargo to be restored to them. Both these actions were  
conjoined; and the Court of Admiralty, by their Judge Ad-  
miral, pronounced this interlocutor: "Having advised the Sept. 22, 1780.  
 " process and writs produced, and particularly the declara-  
 " tion emitted by the said Volkart Hendricks, defender  
 " upon the 14th of June last, before the Judge Admiral  
 " substitute, at Port Glasgow, &c. found, and hereby finds  
 " it proven, That in the month of May 1786 the said ship,  
 " the Katherina libelled, the said Volkart Hendricks then  
 " master of her, was taken and made prize of upon the high  
 " seas, by the ship or letter of marque called the Bellona,  
 " libelled, the said James M'Lean then master or coman-  
 " der of the said ship Bellona; and thereafter sent in by  
 " their captors to the port of Port Glasgow, where she ar-  
 " rived upon the 14th of June 1786; and found and hereby  
 " finds, That the said ship the Katherina libelled, and her  
 " pertinents, and the whole of her cargo of sugar, and cof-  
 " fee, and hides, &c., and every thing on board of her when  
 " she was taken and made prize of, as said is, is lawful  
 " prize; and found and declared, and hereby finds and de-  
 " clares, That the said ship Katherina and her pertinents,  
 " and the whole of her cargo of sugar, coffee, and hides, &c.  
 " do all pertain and belong to the said James M'Lean and  
 " William Cunningham, pursuers, and other owners of the  
 " ship or letter of marque Bellona, to be divided among  
 " themselves and the officer and crew of the said ship the  
 " Bellona, and that in terms of the agreement relative  
 " thereto; and therefore decern and adjudge accordingly;  
 " asoilzies them from the conclusions of the libel at the in-  
 " stance of the said Volkert Hendricks and others against  
 " them, and decerns."

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A suspension and reduction was brought of this decree by  
the appellants. The Lords, pending discussion, and on ap-  
plication made to them, ordered the ship and cargo to be  
sold, and, in the meantime, the proceeds to be consigned.  
In this action the Court of Session found, on the report of

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HENDRICKS,  
&c.  
v.CUNNINGHAM.  
Jan. 31, 1781.

Lord Braxfield, Ordinary, "the letters orderly proceeded  
 " (i. e. Judge Admiral's decree well founded), and assuage  
 " the chargers from the conclusions of the process of reduc-  
 " tion at the appellants' instance, and decern."

Against this interlocutor the present appeal was brought.

*Pleaded for the Appellants.*—1st, The ship captured is proved to have been Dutch property, and to have been furnished with a regular passport, agreeable to the treaties between Great Britain and Holland, and which treaties were still subsisting and in full force at the time of the capture, and therefore the cargo was free, and not liable to capture on board a ship so owned and documented. 2. Even supposing a doubt existed as to the cargo being protected on board a Dutch ship at the time and place of capture, still as the cargo itself has been clearly proved to be Dutch property, and not French property, the same was not liable to capture. 3. But assuming that the capture was legal, still the whole proceedings have been unwarrantable and irregular before the Court of Admiralty in Scotland. 4. It is now established by decisions, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade, or coming from French West India islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly the Tiger, a Danish ship, with a cargo purchased at Cape François, proceeding from St. Thomas to

Jan. 22, 1782. Guadaloupe; the Jonge Jan, a Dutch ship, with a cargo

Jan. 31, — taken in at Port au Prince, and bound to Curaçoa: and like-

July 26, — wise in the cases of the sloop Nancy and six other Danish vessels, with cargoes taken in at Guadaloupe, and bound therewith to the island of St. Thomas; all which were captured by British cruisers, and condemned, in the Vice-Admiralty Court in the British West Indies, were reversed when brought here by appeal before the Commissioners of Appeal some years after.

*Pleaded by the Respondent.*—The papers upon which the appellants rely, and maintain that the ship Katherine and cargo were the property of the subjects of Holland, are unsatisfactory, delusive, and imperfect, while, on the other hand, there was cover and concealment in the case, and strong ground for believing that the cargo was the property of the enemy. There was no passport from the States of Holland on board; 2. The license from the Dutch West India Company restricted the voyage to Curaçoa, and from thence back to Texel; 3. The reports of the French officers

at Cape François bore that the appellant Hendricks was in the employment of Lambert, a subject of France; 4. There were no orders from Van Lankern, the pretended owner, to Mons. Lambert; 5. The ship sailed from St. Domingo under French convoy, and the master took his sailing orders from the French admiral; and she was only parted from them by accident. She then, in these circumstances, was captured because she was carrying provisions to the enemies of Great Britain, contrary to the article of treaty between England and Holland 1673-4, renewed by subsequent treaties. She was to be taken as an enemy's ship; the ship and cargo were therefore liable to capture as French property.

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HENDRICKS,  
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v.

CUNNINGHAM.

After hearing counsel,

LORD MANSFIELD,

" My Lords,—“ This is the case of a ship seized by the Bellona privateer, for prize; a ship which sailed from Amsterdam in the month of August 1779, and was returning from St. Domingo to Amsterdam. The captors, instead of resorting to the Admiralty of England, to bring the proper process, chose to commence a *civil action* in the Admiralty of Scotland. It was not an action *ad rem*, by the mode established in every country of Europe, Scotland excepted, by monition, summoning all the world, but a common civil action, directed against the master only. In a proper process, an immediate examination, upon oath, of the master and crew of the prize would have taken place, and all the ship's papers would have been taken into custody of the Court, to ascertain the fact of the property of ship and cargo. The examinations would have been upon established interrogations, tending to bring out the truth, without entrapping the persons examined. Upon such evidence, the Court would have said whether the fact, as to the property, was clear one way or other; and if not clear, would have directed further proofs. But, in the present case, a libel is raised against the master, charging, generally, that the cargo (for there is not a word of the ship,) is French property, or at least it must be presumed French, because it came from a French island. The ship's papers were not brought into Court; none of the crew were examined except the master, and that accidentally, in a way that his examination is no evidence. Every thing is conducted in a manner dissimilar to Admiralty proceedings. The captors plainly relied upon the second alternative of their libel, and go on to discuss it as an abstract point of law. All the objections that have been taken to the ship's papers found on board, or to the want of other papers, and all the argument as to the matter of fact, have arisen *here*. It is needless to speak of them; for as they were not below, the House cannot listen to them. Parties were never put on issue as to the question of fact below, otherwise the Court must have directed them to bring these

1783. proofs. The captors did not indeed admit that the cargo was Dutch property, but they satisfied themselves with throwing out suspicions HENDRICKS, that it was French property. The judges took nothing into consideration but the question, Whether, as the ship came from the &c. v. CUNNINGHAM. French West India islands, with the produce of those islands, it must not, by legal presumption, be deemed an adopted French ship."

(His Lordship then went into the history of the decisions of the Lords of Appeal in prize causes, during the war preceding the late one, condemning ships and cargoes in the same situation with those in question). "They went on the ground of their trading authoritatively, under licenses from the French king, from whence it was held to follow that they were adopted French ships, navigated by French subjects. The Dutch, taking the benefit peculiar to French subjects, were considered as running the hazards too. It was not merely trading to a French island. No neutral ship, smuggling from the French, was ever condemned. But during the present war, the trade to the French colonies had been laid open to all neutral powers; and by late decisions of the Lords of Appeal in prize causes, this had been held to distinguish the cases of the late war from those of the former; and, accordingly, several Dutch and Danish ships had been restored, which were in the same situation with the one in question. It was not for me to say, if the new doctrine was well or ill founded. I mean to give no opinion on that; but would the House of Lords, in the present case, coming before them incidentally, (and under such circumstances as that they could not have entertained the question at all, but for the appellants waving the objection to the competency of the Courts of Admiralty and Session in Scotland,) overturn rules of law, laid down by the proper Court of the last resort in matters of prize? For my part, I think the House bound by those decisions, right or wrong; and I therefore move, in respect of the appellants' waiver of the objections to the competency, to reverse the interlocutor complained of; to decree the value of the ship and cargo to be restored to the appellants, and to remit the cause to the Court of Session to carry this judgment into execution."

"The appellants seek costs and damages; but this was not a case for costs and damages; the crew and owners of the privateer were not to blame, for the seizure was made on the faith of the old decisions, the late ones being posterior both to the capture and to the decision in the Court of Session."\*

LORD THURLow (Chancellor) concurred.

It was therefore ordered and adjudged that the interlocutors complained of be reversed, and that the value of the ship and cargo be paid by the respondents to the appellants.

For Appellants, Wm. Scott, John Morthland.

For Respondent, Wm. Wynne, H. Dundas, Jas. Wallace.

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\* The decisions here referred, are those cited in the pleadings for the appellants, *ante*, p. 612.

MAGISTRATES and TOWN COUNCIL of the } *Appellants*; 1783.  
 City of Glasgow, - - -  
 Messrs. MURDOCH, WARREN, and Co., *Respondents.* MAGISTRATES  
 OF GLASGOW  
 v.  
 MURDOCH, &c.

House of Lords, 9th May 1783.

**STATUTE—IMPOST DUTY—EVASION.**—The Magistrates of Glasgow are, by statute, entitled to a duty upon all ales and beer brought into Glasgow, from all the breweries in and about Glasgow, for consumption. Sometime after the passing of the act, parties erected a brewery in Anderston, which they conceived beyond the bounds of the act. The Magistrates, however, insisted on payment of their duty; Thereafter the brewers resorted to an agreement with Monro in Glasgow, to buy all their ales on the brewery. By this means he was the medium of still supplying the former customers of the brewers. Held this an evasion of the act, and that the brewers were still liable.

By the act 28th Geo. II. c. 29, renewing and extending former acts granting to the city of Glasgow, a duty on every pint of ale or beer, brewed, inbrought, vended, tapped, and sold within the said city and suburbs, and liberties thereof. This act was extended to the adjacent villages, or extended parts of the city, Gorbals, &c. There is this clause applicable to breweries erected in the immediate neighbourhood of Glasgow: “ And whereas, of late years, sundry persons have erected breweries in the *neighbourhood* of the city of Glasgow, and the said villages of Gorbals and Port Glasgow, and have imported large quantities of ale and beer into the said city and villages, for the consumption of the inhabitants thereof, and have refused to make payment of the said duties, by the foresaid acts granted and made payable, except upon such ale or beer as could be proved by the Magistrates and Council to have been brought into and sold within the said city and villages respectively; which proof is in many cases impracticable, or must be attended with great expense and trouble to the said Magistrates and Council and their collectors; and the said practice, if continued, will not only be of great discouragement to the brewers within the city and villages, but will in a great measure frustrate the good intentions of this act. For remedying whereof, be it enacted, by the authority foresaid, That from and after the 1st May 1755, for and during the continuance of this act, it shall not be lawful for any brewer or seller of beer or ale living

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OF GLASGOW****v.  
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" or carrying on his or her brewery, without the said city of  
 " Glasgow and liberties thereof, or without the villages of  
 " Gorbals or Port Glasgow, to import or sell any beer or  
 " ale into or in the said city, or villages of Gorbals and  
 " Port Glasgow, or the liberties and privileges thereof, un-  
 " less he or she do previously give notice to the magistrates  
 " of Glasgow, or their collector of the said duty, at their  
 " office of Glasgow or Port Glasgow respectively, and agree  
 " to be subjected to and charged with the payment of the  
 " said duty by the said former acts, and this present act.  
 " granted and made payable for all beer and ale which shall  
 " be brewed, by such brewer or seller of beer or ale, living  
 " or carrying his or her business without the said city and  
 " villages, and liberties and privileges thereof. And that  
 " every brewer or seller of ale and beer, who shall import  
 " or sell any ale or beer into the said city or villages, or li-  
 " berties, or privileges thereof respective, without having  
 " given such previous notice, and agreed as aforesaid, shall  
 " be charged with, and liable to the payment of the said  
 " duty, to the Magistrates and Council of the said city, or  
 " their collector or collectors respectively, for all ale or  
 " beer brewed by him or her during twelve calendar months  
 " immediately preceding him or her committing such  
 " offence."

Before the passing of this act, a considerable brewery, called Grahamston, had been erected contiguous to one of the streets of Glasgow, and now making a part of that street, though beyond the royalty of the city of Glasgow. The object of the act was to include this brewery, as well as the other breweries in the neighbourhood of the city.

The respondents erected a large brewery at Anderston, which is a little westward of Grahamston, and a continuation of the same street, and only a few yards beyond the royalty.

At first the Brewery Company did not dispute their liability for the duty, and gave in their names as brewers accordingly; but, in course of time, having opened up a considerable export trade to Ireland and the West Indies, they applied to the Magistrates for exemption from such duty, as the ale was not brought into the city for sale. The Magistrates, though conceiving themselves not bound to grant their request, yet, to encourage trade, allowed them a drawback upon such ales so exported.

They made a further application for an exemption of such

ales and beer which they might sell without the city. This 1783.  
 they refused. Whereupon the Brewery Company gave no-  
 tice that they would sell no more ale or beer within the  
 city.

But they agreed with a person of the name of Monro to pur-  
 chase from them the whole ales on the brewery. And they  
 further advertised, that henceforth they had discontinued fur-  
 nishing ales to customers in Glasgow, and would deal with all  
 on the premises of their brewery. The agreement with Monro  
 was such as to make them able still to answer the orders of  
 their customers in Glasgow through him. It was alleged  
 by the Magistrates that this agreement was a mere device,  
 to evade the act, the object of it being to get free of the  
 charge of duty as brewers.

Action was therefore brought for payment of the duties.  
 The defence was, that since 1st July 1780 they had not im-  
 ported into, or sold ale in the city, and therefore were not  
 liable. Upon which, and after a proof, the Lords sustained June 21, 1782.  
 the defence, and assailed the defenders.

Against this interlocutor the present appeal was brought  
 to the House of Lords.

*Pleaded for the Appellants.*—The whole proceedings of  
 the respondents as brewers, by the agreement in question,  
 were a mere device to evade the act of Parliament. For the  
 years previously, they were selling per ann. 21,049 gallons  
 of ale to the inhabitants of Glasgow, and driving a prosper-  
 ous trade within the city, independently of their export  
 trade; and the only reason and motive of the agreement  
 with Monro was, to escape the duty, and to deprive the re-  
 venue of the city of the impost which they were entitled to  
 exact from them as brewers, within the intent and meaning  
 of the act. Such being the obvious character of the trans-  
 action, law will not lend its sanction to support such a device.

*Pleaded for the Respondents.*—Although the act subject-  
 ed brewers importing ale into the city of Glasgow to the  
 duty in question, on all they should brew and sell within the  
 city, yet this did not extend to all brewers whatsoever. It  
 did not include brewers living without the city, and there-  
 fore could not include the respondents. They certainly  
 were not liable for the payment of the duties which is the  
 object of the present action, because, since July 1780, they  
 have not imported or sold any ale or beer into the city of  
 Glasgow, or liberties.

After hearing counsel,

MAGISTRATES  
OF GLASGOW  
v  
MURDOCH, &c.

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DUNDASES  
v.  
DUNDAS.

LORD MANSFIELD said :

" My Lords,

" The agreement with Monro was a device to elude the meaning of the statute 28 Geo. II. ; and therefore I move your Lordships to reverse the judgment below." It was therefore

" Ordered and adjudged that the interlocutor complained of be reversed. And it is declared, that the respondents, by selling beer and ale, upon the express condition of his selling the whole in the town of Glasgow, and making discounts and allowances, is a manifest evasion of the act of the 28 Geo. II., and ought to be considered as selling within the town of Glasgow by the respondents themselves."

For Appellants, *Henry Dundas, Ilay Campbell.*

For Respondents, *L. Kenyon, Thomas Erskine.*

(M. 15,585.)

LAURENCE, WILLIAM, CHARLES, MARGARET,  
CHARLOTTE, THOMAS, FRANCES - LAURA,  
GEORGE and ROBERT DUNDASES, Children  
of the marriage betwixt Sir THOMAS DUN-  
DAS of Kerse, Bart. and Lady CHARLOTTE  
FITZWILLIAM, his Wife, - - -

*Appellants;*

SIR THOMAS DUNDAS of Kerse, Bart.

*Respondent.*

House of Lords, 21st May 1783.

REVOCATION—ENTAIL.—An entailer had reserved to himself power to alter and revoke the entail executed by him. He thereafter executed a will conveying the fee of his whole real estate in England and Scotland, according to the English form, and revoking all "former and other wills." Held that this latter deed was not effectual as a revocation of the entail.

1764. Sir Laurence Dundas, on the occasion of his son Thomas' (now Sir Thomas) marriage with Lady Charlotte Fitzwilliam, became bound to execute a conveyance of his whole lands and estates in Scotland, to himself in life-rent, and in trust *quoad* the fee, for behoof of the first, second, third, and other sons of the said marriage, and their respective issue male. By this marriage contract power was reserved to destinate the line of succession, and to impose such condi-

tions and limitations upon the issue male as he might think proper. In pursuance of these reserved powers Sir Laurence, in 1768, executed an entail, by making resignation in favour and for new infestment of the same to be made and "granted" "to the said Thomas Dundas, my son, in liferent for his life-  
 "rent use only, during all the days of his natural life, after  
 "my death, and to his heirs male lawfully procreated or to be  
 "procreated of his body, in fee, whom failing, to the heirs  
 "female procreated of my said son's body," &c. The prohibitions against selling and contracting debt were qualified by powers in favour of his son Thomas to grant liferent infestments to widows, and to grant leases not exceeding nineteen years, and to provide his younger children with provisions not exceeding £25,000 Sterling, and also power to Sir Laurence himself "to revoke this present tailzie." This entail was duly recorded.

Thereafter, and in February 1779, by a last will, he gave Feb. 1779.  
 and devised and bequeathed to his son Thomas Dundas all my real estate in England, Ireland, and Scotland, as also in the island of Dominica in the West Indies, and elsewhere, not included in the settlement made on his marriage, and all my personal property of every nature or kind soever, to hold to him, his heirs, executors, &c. charged with an annuity of £2400, to his wife, and legacies to his servants. There was this clause in this will : "I do hereby revoke all former "and other wills by me heretofore made, and do constitute "and appoint my dear son my sole executor." The testing clause ran thus : "In witness whereof I have hereto set my "hand and seal this 14th day of February 1779." (signed) "Laurence Dundas." "Sealed, published, and declared by "the said testator, as and for his last will and testament, in "the presence of us, who in his presence, and in the presence of each other, have subscribed our names as witnesses." (Signed) "A. Drummond, Crawford, Cha. Sayer." This deed was prepared and executed in London according to the English form.

On Sir Laurence Dundas's death, the questions were, 1. Sept. 21, 1781.  
 Whether the clause of revocation therein was good to recall the entail; and, 2. Whether the deed was good of itself to carry heritage in Scotland, it not being tested according to statutes.

The Court of Session pronounced this interlocutor: "Find Feb. 25, 1783.  
 "that the deed of entail libelled on is effectually revoked  
 "by the deed executed by Sir Laurence Dundas upon the

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DUNDASES

v.

DUNDAS.

May 25, 1768.

1783.

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v.  
DUNDAS.

Mar. 11, 1783.

"14th Feb. 1779." And on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellants.*—The latter will or deed 14th

February 1779 being not holograph of the granter Sir Laurence Dundas, and not being tested, in terms of the statutes, as wanting the name and designation of the writer, and designation of the witnesses, is null and void, and of no effect to revoke an entail conveying heritage, executed with all the statutory requisites. It is no answer to this to say, that the testament is not founded on as a conveyance, but only as an effectual revocation, because the law of Scotland acknowledges no such distinction, as all deeds affecting heritage must be executed in a formal manner: But, separately, Sir Laurence, by the latter deed or will, did not intend to revoke the entail, but the sole object of that deed was to burden the heir with the annuity and legacies; for had he intended it so to revoke the entail, the word entail would have been mentioned, and the general terms, "all former and other wills," cannot have the effect of revoking a deed of entail by construction or implication.

*Pleaded for the Respondent.*—Although Sir Laurence had undoubted right to alter or revoke the entail at pleasure, yet the question is, Whether the last will of 1779 was intended to be, and was in point of law, a revocation of that deed. It is clear that the later deed was a departure from the entail or destination, in so far as it gave his son, the respondent, a fee simple of the whole estates in England and Scotland, except the lands settled by the marriage articles; and the plain meaning of revoking "all former and other wills," just meant, that in pursuance of the powers reserved to himself, he now altered the previous settlement, and thus revoked the entail. Its effect in law is equally beyond dispute, because the reservation of a power to do any act, is a mere declaration of will, which may be executed by any authentic deed. And as the will here questioned was properly authenticated according to the law of England, where it was executed, it ought to be held good as a contrary declaration of will to the effect of revoking a former deed, though conveying heritage. Though not good as a deed conveying heritage in Scotland, yet, being properly authenticated, it was good as a revocation.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained

of be reversed, so far as it finds that the entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas upon the 14th Feb. 1779, and that the case be remitted back to the Court of Session in Scotland to carry this judgment into execution.

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v.

WEDDERBURN,

&amp;c.

For Appellants, *Jo. M'Laren, Robert Blair, Alex. Abercromby.*

For Respondent, *Henry Dundas, Lay Campbell, Alex. Wight.*

The Rev. Mr. WILLIAM MILLIGAN, Minister  
of Kirkden, - - - - } Appellant;

SIR JOHN WEDDERBURN and Others, Heritors  
of the Parish of Kirkden, - - } Respondents.

House of Lords, 8th July 1784.

**STIPEND—AUGMENTATION—*RES JUDICATA*—APPELLATE JURISDICTION OF THE HOUSE OF LORDS.**—Held, though a stipend had been augmented since the Union, that there was no law which barred the minister from insisting for a further augmentation. Also, that the House of Lords had an appellate jurisdiction in reviewing the judgments of the Lords of Session, as Commissioners of Teinds in such questions.

The appellant, as the settled minister of Kirkden, brought an action of augmentation, modification and locality of stipend, before the Lords of Session, as Commissioners of Teinds, against the heritors of the parish. The last modification and locality was obtained by a decree of Court on 18th July 1716, by which the stipend was fixed at £47. 4s. 5*4*/<sub>2</sub>d., including communion elements. The summons then proceeded to cite the several acts passed for the provision of competent stipends to the ministers, stating that the above sum was by no means adequate to the weight of the charge, nor could it be considered so, from the great increase in the price of all necessaries of life for the last sixty years. The respondents confined themselves to a preliminary defence, to the effect that the stipend of this parish having been augmented by a decree in the year 1716, they were entitled to found on that decree as a *res judicata* in bar of this action, because of the rule of the Court, confirmed by uniform practice, of not granting any new augmentation, where the stipend had been augmented since the Union.

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&c.  
July 22, 1778.  
Aug. 4, 1779.

The Court of Session, by interlocutors, of these dates, sustained the defence, and held the appellant barred from raising the present action.

Against these interlocutors the present appeal was brought, and on its coming on for hearing, and in consequence of the new exception taken to the competency of the appeal to the House of Lords by the respondents, on the ground, that as the Court of Session, as Commissioners of Teinds, acted by special authority from the Legislature, and as a committee of Parliament, their decision was final, and, therefore, that there was no appeal to the House of Lords, in questions regarding the augmentation of stipend. The case was delayed to be further specially heard on this point.

*Pleaded for the Appellant.*—In regard to competency of Mar. 19, 1783. seeking a further augmentation. That the decree in 1716 could not form a *res judicata*, because no person can possess an absolute right of property in tithes, which are, by law, subject to a perpetual burden in favour of the ministers of the parish, who are at all times entitled to have stipends modified to them, suited to the state of the parish, and the weight and importance of the charge, such as the increased expense of living, the value of the tithes, or of the population of the parish, and the Commissioners of Teinds have a power, from time to time, to make such additions to ministers' stipends as they may think necessary. The appellant's present stipend is under the minimum, and there is no rule of Court or uniform practice which bars augmentation in such circumstances, where the last augmentation has taken place since the Union. Because, by the spirit and letter of the above statutes, there is a power in the Court to augment the ministers' stipends, whose stipend is below the minimum established by law. 2d, In regard to the jurisdiction of the House of Lords, in appeals from the Court of Teinds in Scotland, it is only necessary to refer to the jurisdiction hitherto exercised by your Lordships in a great many cases, and also to the Acts of Parliament constituting the Court of Teinds, to refute the objection taken to the competency of the House of Lords to judge in this appeal.

*Pleaded for the Respondents.*—The appeal is incompetent, because the Court of Session act as Commissioners of the Legislature, in awarding augmentations of stipend, with discretionary powers, which exclude any appeal to a higher Court, where such right of appeal has not been reserved.

In this respect, the Commissioners of Teinds are not a court of law, but a court of discretion, possessing and exercising parliamentary powers, just precisely in the same way as before the Union in 1707, when the Court itself was a Commission of Parliament. And being authorized as a standing Committee of Parliament, to act in the matter of quantum of ministers' stipends, they alone are entitled to exercise the discretion of allowing or refusing an augmentation according to circumstances; and from their judgment in these respects, there is no appeal to the House of Lords. 2d, But even if though the appeal was competent, the decree 1716 must be considered as a *res judicata*, whereby the appellant is barred from any further augmentation, the last augmentation having taken place since the Union, which is a rule long established and recognized in this Court.

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After hearing counsel,

LORD CHANCELLOR THURLOW,

" My Lords,—“ This case has been argued upon an extensive ground, more extensive indeed than was necessary, and upon a ground which had properly no relation to the question. It is not now before us what provision the clergy should have; but the case before us is to be determined on the law. The question is, Whether by the law of Scotland, the decree should be affirmed? To understand the question, it is necessary to construe the decree. The ratio given is, that it is incompetent to enter into the consideration of a summons of this kind, if, since 1707, a decree has been pronounced by the Court giving augmentation. We are therefore to consider, Whether, by the law, there is that sort of bar by which the Court are prevented from entering upon the merits, not whether upon the merits the living would be augmented; whether it is enough to say there has been such a decree, not whether there is much of sound discretion in the rule; not whether it may be proper in nineteen, out of twenty cases;—but whether not one of the twenty cases shall be looked into? If this is the law of the land, it must be good; but if only a principle of discretion, the discretion erected into a rule is inept, unless the law has furnished that rule.

" The history of the tithes has been entered into only for the purpose of giving a general idea of the situation of the clergy, and of the constitution of the Court. The tithes were originally part of the patrimony of the church; had they continued so without additions more corrupt, they might have been considered as the *jus divinum* of the clergy, and being made part of the law of the land, that right must have been recognised; but this right was shaken by going into abuse. The Reformation in Scotland was too severe. The rights of the church were considered as a wen which it was necessary to cut off. All ecclesiastical preferments were cut down;

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and being considered as belonging to no person, they were given to the king. The greatest part of these were annexed to benefices. There never can be a solid establishment without attention to the parochial clergy. All preferments above them is for good discipline and order. In Scotland, all the livings of the parochial clergy had gone into the hands of their superiors.

"On the revolution which took place in ecclesiastical establishments, the great men obtained the estates taken from the church. The clergy in Scotland were left perfectly destitute. The first provision made for them, was 300 merks for each benefice; and it is to be observed, that the statute giving them that provision, calls it a temporary provision, until the teinds can be restored. They never were restored, and the reformed church of Scotland remained in a very sad state.

"The first statute 1617, raises the provision from 300 to 500 merks, and fixes the *maximum*. In 1621, another commission was named, with an authority to augment the churches. Both these commissions were only temporary; it was wise, therefore, to confine them to augment churches not before provided. If the law had continued in the same form, I would have acceded to the whole argument of the respondents. In 1633, the Legislature increased the rate at which they were to be augmented. The Court of Session, in interpreting this statute, have thought themselves at liberty to extend the *maximum*, because, in the words of Erskine, "the general intent," &c.

"Tithes given to bishops, to hospitals, and other corporations, the one mensal, the other common tithes. A doubt entertained whether the Court could exercise their authority on these; but these were also considered to be within the reason of the statute.

"A variety of commissions were afterwards granted; these vary in the important phrase, having power to augment all parishes where there is not a sufficient provision; a question, whether confined to those augmented before; never was there such a torture of interpretation. The reference to former commissions is only as to the mode of proceeding; the statute 1690 seems to recognize rather than give the power of revision.

"It is said by the respondents, that from 1633 to 1707, it was impossible to reform the acts of former commissions or their own. If this was so, and they could not revise, why should the perpetual commission in 1707 revise the decree of former commissions? This being the state of the case, it is abundantly clear, that the acts confer the authority of revision, and that they have neither, in defining the powers of these commissions, or in any part of them, created this species of bar to any action.

"In all these acts a number of other authorities are given. Valuations and sales of teinds, as far back as 1633, it was the intention of the Legislature to give to the heritors the occupation of their own teinds;

it was then thought proper to fix the teinds at one-fifth of the rent. In 1690 teinds, not in *purview* of the old statute, were also fixed, and nine and ten years purchase were the rules then ascertained for the different species of teinds, apparently because an absolute estate in the tithes was not given; but they are always to be subject to a competent provision for ministers.

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"The law therefore is, that the Court are to review decrees upon the actual situation of the parish. In none of the books is there the smallest trace of this rule; and when the Lord Advocate says, the Court are in the daily practice of it, he must mean that it is an idea always afloat in the minds of the judges.

"It has been argued by the respondents, that if this judgment is to be reversed, it ought to be upon the special circumstances of the case, but this cannot be done. At the same time, were the arguments used by the appellant on the general situation of the clergy, to pass without notice, it might be productive of worse consequences than the respondents are afraid may arise from determining the general point.

"I am perfectly clear, it is competent to appeal from time to time to the Court; but it is impossible that frivolous and vexatious appeals can be made with impunity; the Court can award full costs. If appeals are made here, the House always provide the means to make costs effectual where appeals are frivolous; and the recognisance entered is twice the yearly value of almost any livings in Scotland. I think the Court must with discretion go beyond the *maximum*, but that is not before us.

"Much has been said of the policy of a proper provision for the clergy. A state has no business with religion, as religion, but merely as a political establishment. Were I speaking as a legislator, I would say that the well-being of Scotland was deeply concerned in making a more liberal provision for the clergy. I would have higher promotion, higher hopes, and greater preferment. It is that alone can keep the clergy in a situation to be of use to religion. For he must be a wretch indeed, whose hopes are bounded by the scanty preferment of that country. But in a judicial line, it is impossible to extend the policy.

"This case is far from reaching the maximum. It was the minimum in 1716. But the circumstances are not before the Court of Session, nor what changes may have happened to authorize an augmentation now. I think his having got one then may be a bar to his receiving one now; but I cannot affirm a judgment which says I shall not enter into the consideration of the case. Another question has here been stated, whether it was augmented to the *minimum*? I don't know why the communion elements should be laid upon the teinds. The communion money is not affected by any of the statutes. Suppose that fifty merks sufficient in 1716, *non constat* that though

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enough then, it is so now. It is expensive in Scotland; I wish it were less so, that it might be more frequently administered. But who shall say at what the communion elements were rated? All the circumstances prove there is no limitation, and consequently they should have looked into it.

"It appears to me great inconvenience must arise in allocating a stipend, where victual is given by the Court, though none paid as tithe. The statute said that it could no way exceed the tithe; in this way it may. If the tithe 800 merks, the stipend four chalders victual and 100 merks, the value must clearly exceed the tithe.

"The Court have no reason in expediency or authority in law, to say they will not look into it. I therefore move your Lordships to reverse the two interlocutors complained of, and to remit to the Court to proceed on the merits."

It was ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session in Scotland to give the necessary directions for carrying this judgment into execution.

For Appellant, *Henry Dundas, William Adam, William Robertson.*

For Respondents, *Ilay Campbell, T. Erskine.*

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JOHN COLQUHOUN,	-	-	-	<i>Appellant;</i>
JOHN CORBET, Esq.	-	-	-	<i>Respondent.</i>

House of Lords, 27th July 1784.

LEASE—ARBITRATION—CONSTRUCTIVE CORRUPTION—OVERSMAN—PAROLE.—Disputes having arisen between a landlord and tenant, regarding a breach, and not implement of the stipulations of the lease on the part of the landlord. Actions were raised to have the tenant's rights ascertained, which were submitted to two arbiters, mutually chosen by deed of submission. There was a clause in the submission, providing, that in case of a difference of opinion, the oversman named was to be called in. A decree arbitral was pronounced, setting forth, that in consequence of a difference of opinion, the oversman was called in, whereupon the arbiters, along with that oversman, pronounced judgment.—A reduction being brought of the decree on the ground of corruption,

and also of falsehood, under the act 1695, and that the decree arbitral had stated falsely that there had been a difference of opinion between the arbiters, when there was none. The latter reason of reduction repelled by Court of Session. In the House of Lords affirmed, without prejudice to the discussion of the other reasons, in respect the decree arbitral appeared so partial as to amount to constructive corruption in the arbiters, and therefore reducible under the act 1695. Also held, that parole was competent to expigate whether a difference of opinion took place, although the decree arbitral set forth that fact.

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A lease was let by the respondent to the appellant on 20th July 1768, of the lands of Gartcosh, *as then lately possessed by Robert Thomson*, for the period of 38 years. The term of entry was at Whitsunday 1769, the landlord becoming bound to erect and build complete houses and offices on the farm, before that term, the tenant binding himself to pay £65 sterling for the first nineteen years, and £80 for the remaining nineteen years; and likewise to keep the houses and fences in proper tenantable and fencible condition, during the whole years of the lease, and leave them so at his removal.

The landlord, instead of building the houses and offices before the term of entry, only began to build these at that term, and, in consequence of his circumstances and inability, the building even then went on slowly. The tenant, on his part, subdivided the farm, fenced and enclosed, and laid out a great deal of money in enclosures. Before the rent fell due, the landlord had generally received part payment in advance, for the purpose of forwarding the buildings. Several payments of this nature were even not so applied, but to other purposes; and the houses and offices were still unfinished. Disputes thus arose between them. The tenant resolved not to perform his part, namely, pay his rent, until the landlord had performed his—the nonperformance of which, for the last ten years, had occasioned the tenant great damage, besides the illegal and oppressive diligence of poinding, &c. raised against him. These disputes, including an attempt of the landlord to take twenty acres of land from him, became the subject of arbitration in 1776, but no award was pronounced. Thereafter actions were resorted to, and these actions, embracing these disputes, were submitted to arbitration "of Robert Gray, Esq., and James Carse, arbiters mutually elected by the parties, all claims

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"controversies, and debateable matters preceding this date,  
 "and particularly the two processes of suspension de-  
 "pending before the Court of Session, and also the process of  
 "damages at the instance of the tenant. And whatever  
 "the said arbiters, or in case of their varying in opinion,  
 "whatever they, or either of them, with David Muir, por-  
 "tioner in Gartferry, hereby elected umpire or oversman,  
 "shall give forth and pronounce as their final sentence and  
 "decreet arbitral."

The award which followed this submission sets forth,  
 "That I, the said Robert Gray, and the said James Carse,  
 "having, in consequence of our acceptance of the foresaid  
 "submission, met with the parties submitters, received in  
 "their claims and answers, and taking some steps towards  
 "determining the matter submitted, *but having differed in*  
 "*opinion as to some points*, called in to our assistance me, the  
 "said David Muir, as oversman foresaid; and me the said  
 "Robert Gray, and David Muir, having fully considered the  
 "claims, answers, replies, &c., and other productions given in  
 "by the parties—the processes mentioned in the submission,  
 "met upon the grounds of the farm of Gartcosh, belonging  
 "to the submitter, John Corbet, perambulated the marches,  
 "viewed the fences, and many times met with the said James  
 "Carse and the submitters, when they were heard *viva voce*,  
 "as well as with the said James Carse by ourselves."

The appellant brought a reduction of this decree arbitral, on the ground chiefly, 1st, That the award asserted *falsely*, that the arbiters had differed in opinion. 2d, No difference having taken place, the umpire had no right to interfere. These were further amplified in the argument as follows. That there was no difference of opinion between the arbiters—that the arbiter and oversman who signed the decree arbitral, had not before them the processes therein mentioned, nor many of the papers essentially necessary to enable them to form a just opinion on the merits of the case, and therefore, what the award sets forth on these subjects is false; and falsehood being averred against the arbiters, it was reducible under the act 1695. That the arbiters not having differed in opinion, the oversman had no right to interfere, and acted without any power or authority. That the decree or award, was made after the submission or arbitration bond had expired, and the decree was therefore void. That it was *partial* and *unjust*, and ought to be set aside. It had

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awarded what was not submitted. And also because, though the appellant had covenanted to pay 10s. per acre for his whole farm, the award allowed him only a deduction of 3s. per acre, for want of the thirty-nine acres taken from the farm let, and also had omitted to give allowance for twelve acres seized by the landlord to plant firs on. In defence, it was stated, that the arbiters had differed in opinion with respect to the extent of the appellant's claim for damages. That Mr. Carse insisted this should be taken up at the commencement of the lease; whereas Mr. Gray was of opinion they could not go beyond January 1776. It therefore became necessary to call in the umpire. That the arbiters had essentially differed in opinion therefore, before the umpire interfered. That the award expressly sets forth this, and finally, that it was a mere mistake in reckoning the time, to say that the submission had expired before the award was pronounced. The submission expired on 26th January 1781, and the award is dated 22d January. The whole discussion was afterwards confined to the point of a difference of opinion in the arbiters, so as to support the interference of the oversman.

After the arbiters were examined by order of Court, the Lords pronounced this interlocutor: "The Lords having ad- Dec. 5, 1783.  
" vised this petition with answers, and the depositions of  
" James Carse, Robert Gray, David Muir, and George Smith,  
" taken in consequence of a former interlocutor in this cause,  
" repel the reasons of reduction of the decreet arbitral chal-  
" lenged, assoilzie the defender, and decern; conjoin the  
" three several suspensions brought by the pursuer against  
" John Corbet the charger, with the process of reduction;  
" find the letters orderly proceeded in these processes, and  
" decern; find John Colquhoun, the pursuer and suspender,  
" liable in full expenses of this process." On reclaiming Dec. 29, —  
petition the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—The decree arbitral is void and null, being only pronounced by one of the arbiters and the oversman, without the intervention of the other arbiter, and without any regular devolution of power upon the oversman. There could be no regular devolution of the powers of the arbiters upon the oversman, unless by writing under the hands of both arbiters. The common law of Scotland on this subject, as ascertained by a multiplicity of decisions,

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declaring that no other species of evidence but written evidence was admissible to prove a difference of opinion between arbiters, and that the testimony of witnesses, or parole evidence, is wholly incompetent. But, supposing parole evidence competent, yet there was no proof of that kind brought. He offered in the Court below, that if they allowed a proof by parole, he was prepared to bring forward a proof by witnesses to establish what he averred, namely, that there was no difference of opinion. The only witness examined was Carse, by order of the Court. Gray, Muir, and Smith, were examined, notwithstanding the appellant's objections to them on the ground of interest; yet even upon the evidence of these, if competent, it was clear that there was really no difference of opinion. Besides, the arbiters had exceeded their powers. They had decided on damages incurred after the date of the submission, whereas that was confined to all claims prior thereto. They had also prorogated the submission without a proper power to prorogue. The decree arbitral is full of partiality and injustice towards the appellant, in regard to the acres of the farm let, of which he was unlawfully deprived, and in the many other particulars set forth in the case.

*Pleaded for the Respondent.*—The only doubt which the Lord Ordinary or the Court ever entertained in regard to this cause, was in regard to the statement that there was no difference of opinion on the part of the arbiters, and therefore that the umpire had no right to interfere. But as that point has been fully and satisfactorily explicated by the examination of the witnesses, the Court had no hesitation in pronouncing the judgment to which it came. No doubt the decree arbitral set forth this fact, but this did not, and could not exclude parole evidence where the truth of that fact was questioned. And the want of written evidence to establish that difference of opinion between the two arbiters, does not render parole proof by witnesses incompetent to establish that fact, because no such rule of evidence is established by any law or practice in Scotland, and assuredly there is no decisions supporting such a doctrine. Even if there were, the particular circumstances of this case would justify parole. Mr. Carse, one of the arbiters, positively refused to sign any opinion in writing. Looking therefore to the circumstances, that during this litigation the respondent gets no rent for his farm, which the appellant keeps in possession, and has so

exhausted and mismanaged the culture of the lands, that, supposing him to quit it at this moment, it would take, at least, some years to put it again in good condition, fit to be let, it is clear, that the interlocutors of the Court below are right, and ought not to be disturbed.

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After hearing counsel,

LORD CHANCELLOR THURLOW,

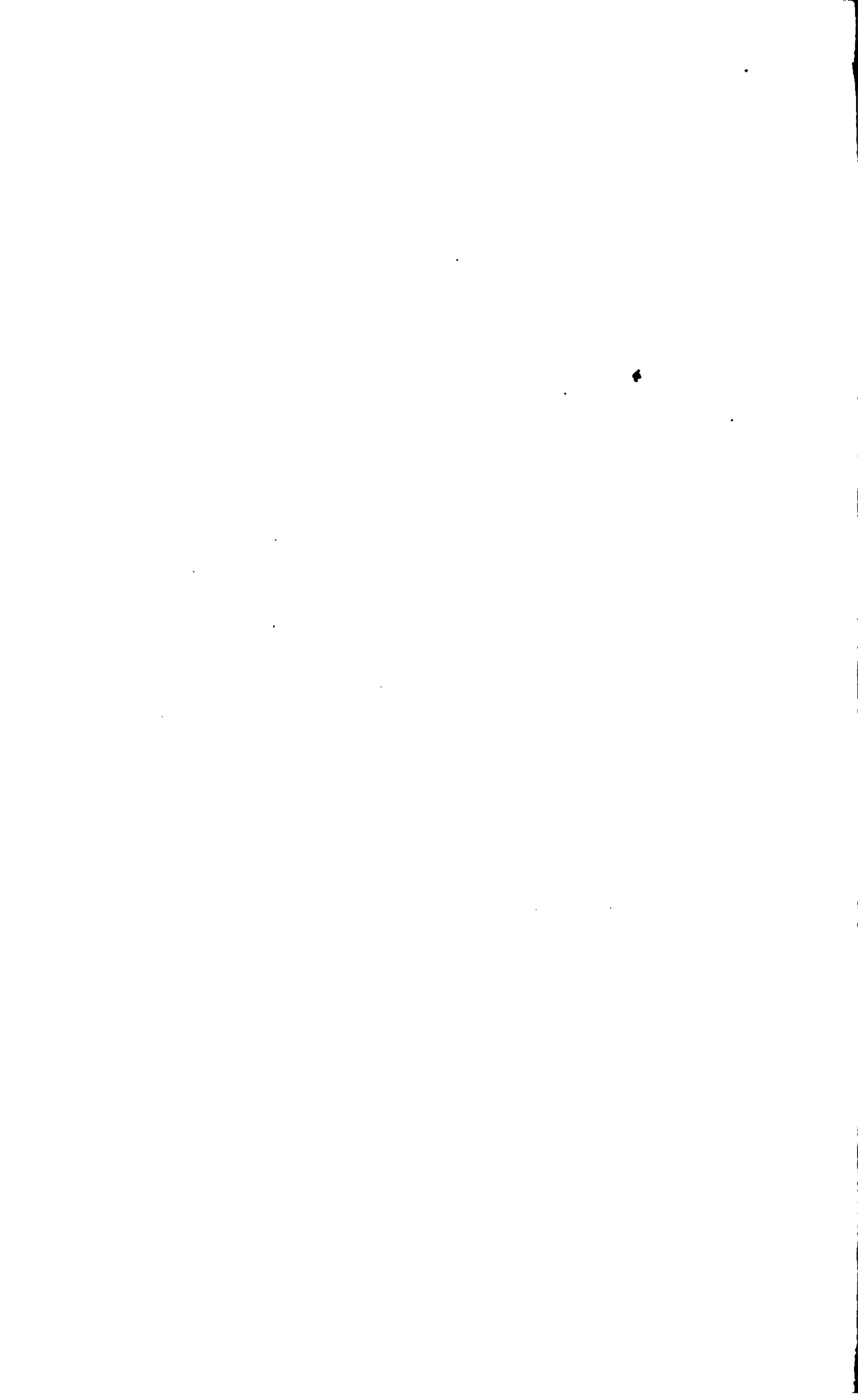
" My Lords,

" I am of opinion that, in the circumstances of this case, the umpire had a right to interfere; at sametime, I think Carse was right in insisting that the damages should have been considered from the beginning of the lease. That the decreet appeared so partial that it amounted to constructive corruption in the makers of it; and therefore it was reducible, in terms of the act and regulation 1695. I therefore move that the interlocutor be affirmed, without prejudice to Colquhoun's impeaching the decreet, upon any head, but want of power in the umpire."

" It was therefore ordered and declared that the case provided for in the submission, viz. the case of the two arbiters, Robert Gray and James Carse, varying in opinion, is sufficiently established, and that thereupon David Muir and Robert Gray had competent authority, according to the terms of the said submission, to give forth and pronounce a decreet arbitral between the parties to the submission. And it is ordered and adjudged that the interlocutors complained of be affirmed, without prejudice to the pursuer insisting on his summons of reduction upon any other head of objection to this decreet arbitral, or other proceedings under the said submission."

For Appellant, Andrew Crosbie, W. Cha. Little.

For Respondent, Ilay Campbell, Ar. Macdonald.



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IN

## VOLUME II.

**ABSOLUTE DISPOSITION.**—*Vide Disposition.*

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—(2.) Adjudications were purchased up by the heir succeeding to an estate which was specially destined to “heirs male.” He took the conveyance of these adjudications to himself and his “heirs whatsoever.” Held that when the estate descended to an heir male, different from the heir of line, or heir whatsoever, that the heirs of line were not entitled to succeed as such to the adjudications; but that these, as collateral and accessory rights, accrued to the family estate, and were not now a separate estate, but extinguished *confusione* in the person of the heir male. *Burnet v. Sir Thomas Burnet*, Bart. 30th April 1766, p. 122—*Vide Succession—Heirs whatsoever.*

—(3.) **PRESCRIPTION OF**—*Vide Prescription.*

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**ALIEN**—A person, a natural born subject of England, had issue born abroad before the 7th Anne (Naturalization act) out of the allegiance of the king. This son had issue, Count Anthony Leslie, also born out of the allegiance of the king; Question of law submitted to the whole judges of England, Whether Anthony was capable of inheriting land estates in Scotland? Held unanimously, on full consideration of the statutes, that Anthony Count Leslie was to be

deemed an alien, and not capable to inherit such estate. That the statutes extended only to the children of a natural born subject of the first degree, and not to the grandchildren, and Anthony's father not being a natural born subject of England, but an alien born abroad, before the passing of the 7th Anne, he could take no benefit.—*Counts Leslie v. Peter Leslie Grant and his Curators*, 2d Feb. 1763, p. 68.

**ALIENATION.**—A question was raised how far leases for four nineteen years duration were an alienation of part of the estate, which by the entail prohibited alienation. Held the leases good, in the special circumstances, for the grantor's life, and the life of the heir who ratified them; but that the lease of the mansion house, offices, and gardens, was bad, and also of the lands beyond the lifetime of these parties, and therefore to that extent reduced.—*Orme v. Leslie of Balquhan*, 25th Feb. 1780, p. 533; *Vide Entail* (13.)

**ALIMENT.**—(1.) Where the husband offers to aliment the wife in his own house, and, instead of doing that, takes lodgings for her, and does not eat, sleep, or live in the same house with her: Held this is not adherence sufficient to exempt him from liability in a separate alimony.—*Arthur v. Gourlay*, 9th March 1769, p. 184.

—(2.) Held that a liferenter of an estate had no claim against her daughters, who had provisions left them payable on attaining a certain age, for alimenting them until these provisions fell due, they being alimented *aliunde*; and that the assignation of this claim of aliment was ineffectual.—*Lady Forbes v. Lord Forbes*, 18th Feb. 1760, p. 36.—*Vide Heir and Liferenter.*

**AMBIGUOUS CLAUSE**—*Vide Lease* (6.)

**ANTENUPTIAL CONTRACT**—*Vide Marriage Contract.*

— Parties, before their marriage, entered into an antenuptial contract of marriage, conveying the estate of the husband to himself, and the heirs male of the marriage, reserving power to limit the said heirs, with and under such irritant and resolutive clauses as he should think proper. In this contract he bound himself to do no deed whereby the order of succession might be altered or diverted. He afterwards executed a strict entail ; he also contracted considerable debt, although the entail gave no power to sell for the payment of these debts. Held the entail reducible, and reduced accordingly. *Flemings v. Fleming*, 12th March 1782, p. 588.

**APPARENCY**—Held, reversing the judgment of the Court of Session, that the executors, and not the heir of the party who died in possession of an estate held on apparency, were entitled to the arrears of rents unuplifted at her death.—*Hamiltons v. Hamilton*, 5th April 1767, p. 137.

**APPEAL**—(1.) An appeal being brought from the sentence of the Court of Session as a Commission of Teinds, in application made to it for an augmentation of stipend, it was objected that the Court and Commission of Teinds being a Committee of Parliament, and exercising Parliamentary powers, their judgment was final, and the appeal incompetent. Held that the House of Lords had an appellate jurisdiction in such cases.—*Minister of Kirkden v. The Heritors of Kirkden*, 8th July 1784, p. 621.

— (2.) Held that an appeal to the House of Lords is incompetent from a sentence of the Court of Exchequer acting ministerially as a Board of Treasury, under the special directions of an act of Parliament.—*Haldane v. the late Earl Marischall*, 26th March 1778, p. 443.

— (3.) Held that an appeal is not competent to the House of Lords from the sentence of the High Court of Justiciary in Scotland pronounced in a criminal case.—*James Bywater v. The Crown*, 1st May 1781, p. 563.

**APPOINTMENT OF SCHOOLMASTER**—*Vide Schoolmaster.*

**APPROBATE AND REPROBATE**.—In a marriage contract the husband had conveyed the whole lands and heritages that he might conquest or acquire during the marriage, one half to themselves in conjunct fee and liferent, and to the children of the marriage in fee, whom failing, to his wife's own nearest heirs. And in case of his dying without children, and his wife surviving, then in that case he disposed to her 100 merks, in full of all she or her next of kin could claim. The latter event happened. Held, in an action brought by her next of kin for one half of the conquest, after her death, that she could not take the 100 merks and also claim one half of the conquest.—*Fairie v. James Watson*, 19th Feb. 1770, p. 213.

**ARBITRATION CLAUSE**—(1.) A contract in regard to the execution of the works in building a bridge, contained a clause, referring all differences and disputes to two neutral men of skill as arbiters to be chosen, and in case of their differing, with power to them to choose an oversman, whose determination was to be final. In a summons raised for failure to implement the contract, a preliminary defence was stated, founded on this clause ; Held that an agreement to refer all disputes to arbiters did not bar the present action in this Court, and that the plea in this cause was irrelevant and inadmissible.—*Wm. Milne, &c. v. Magistrates and Town Council of Edinburgh*, 15th Feb. 1770, p. 209.

— (2.) Construction of lease held entitling the landlord to shut up the level, communicated from his colliery to another without his consent. This dispute having been referred to arbitration, with power to issue orders as to the opening the level, until the question of right was determined, and this reference having fallen to the ground by expiry of the same : Held that any order of the arbiter to open the level acquiesced in by both parties during

the subsistence of the submission, could not be the ground of a judgment holding that the landlord could not shut up the level, as such judgment was contrary to the judgment of the House of Lords in the same case finding the reverse; and also because the submission founded on had become an absolute nullity from the expiry of the same. Andrew Wauchope *v.* Sir Archibald Hope, &c. 10th April 1774, p. 338.

— (3.) Circumstances in which it was observed in the House of Lords, in reference to the proceedings of arbiters, that the same amounted to constructive corruption, so as to make the decree arbitral reducible under the act 1695. Also held that a difference of opinion in the arbiters was sufficiently established to authorize the interference of the oversman.— Colquhoun *v.* Corbet, 27th July 1784, p. 636.

**ARRESTMENT.**—(1.) Two parties became guarantee for a company on the latter depositing bills due to them in their hands as a security. This was done, and a list of the bills drawn out and handed over, and a receipt granted by the guarantees. They were immediately redelivered to one of the partners of the company, who discounted and used some of them for company purposes. Held, on failure of the company, that the guarantees, though they had thus parted with possession, were to be preferred to an arresting creditor.—M'Dowal and Gray *v.* Annand and Colquhoun's Assignees, 26th Feb. 1776, p. 387.

— (2.) A party absconded from Glasgow, came to London, purchased cotton from the merchants there, to whom he was a stranger, representing himself as a merchant in Glasgow in good credit, and giving references to certain parties in London, who, by previous arrangement with the buyer, spoke favourably of his credit, and induced the seller to give the cottons. Held on proof of his insolvency, that the sale was void, and the seller entitled to reclaim his goods while *in medio*, and to be preferred to the creditors of the buyer arresting.— Campbell, Robertson and Co. *v.* Wm.

Sheppherd and Mandatories, 8th Nov. 1776, p. 399.—*Vide Sale.*  
**ASSIGNATION**—*Vide Heritable Creditor.*  
**AUGMENTATION**.—*Vide Stipend.*

**BACK BOND.**—*Vide (2.) Disposition—Redeemable Right.*

**BANKRUPTCY.**—(1.) A company in London became bankrupt, and under the bankruptcy obtained a certificate and discharge. Some years thereafter an action was raised by a creditor who had ranked and been paid his dividend out of the estate, against the surviving partner in Scotland. Held that the discharge and certificate protected him, in terms of the 5 Geo. III. c. 30, § 70; and that concealment of property in Scotland, which did not then belong to him, was no bar to the benefit of the act. Cathcart *v.* Blackwood, 26th Feb. 1765, p. 100.—*Vide Foreign.*

— (2) A company, after adjudication had been led against their estates, and ranking and sale was raised but superseded, and a petition to sequestrate presented to the Court, granted a lease for 99 years. Held, reversing the judgment of the Court of Session, that the lease was not reducible on the head of bankruptcy.—Dr. Thriepland *v.* Creditors of York Buildings Co. 15th April 1779, p. 496.

— (3.) Circumstances in which lease held reducible on head of bankruptcy.—Dr. Fordyce *v.* York Buildings Co. 16th April 1779, p. 500.

— (4.) Circumstances in which held deposition of a bill in the hands of a creditor by his debtor, within 60 days of his bankruptcy, (by whom it was acquired from third parties indebted to him,) reducible under the statute 1696, c. 5.—Angus *v.* Manson, 22d Mar. 1774, p. 336.

— (5.) Circumstances in which a party having procured possession of bills in a legitimate manner, though sent for, and to be appropriated to a special purpose, was held entitled to retain these bills in payment *pro tanto* of his own account, although the remitter was on the eve of bankruptcy, but had sent them before any act of bankruptcy was committed.—

- Hewit *v.* Elliot and others, 6th Dec. 1775, p. 381.
- (6.) Circumstances in which furnishers of goods, on hearing of insolvency of the purchasers, were entitled to reclaim the goods while *in medio* against creditors arresting.—Campbell, Robertson & Co. *v.* Shepherd, &c. 8th Nov. 1776, p. 392.
- (7.) *Vide* Guarantee (1.)
- (8.) *Vide* Ranking in Bankruptcy.
- BANKRUPT'S OATH.**—A company having become bankrupt, circumstances in which the oath of one of the bankrupts was allowed to be taken to prove that he had certain bills returned to him, not for behoof of the company, but in trust for the guarantees of the company.—M'Dowal and Gray *v.* Annand and Colquhoun's Assignees, 26th Feb. 1776, p. 387.
- BILL.**—(1.) (Negotiation) Held a party (a public officer) to whom a bill was indorsed, in security of payment of the customs, was bound, on the bill falling due, duly to negotiate it, and payment not being recovered, in consequence of his neglect to do so; held him liable in the contents.—Grosset *v.* Murray, 17th March 1763, p. 81.
- (2.) Circumstances in which letters and other documents held not to prove that certain bills were granted merely as agent for a third party, and only to vouch the extent of the creditor's advances to that party, until a certain share in his trade in Virginia was given him, notwithstanding it was admitted that the money so received, and for which the bills were given him, was appropriated for that third party's use, and he had agreed to give the creditor in the bills the share in the concern he desired.—Lawson *v.* Tait, 28th April 1779, p. 505.
- (3.) Where the holder of a dishonoured bill makes diligent inquiry at the former residence of the holder and indorser, for the purpose of intimating the dishonour, but cannot find him, and does all in his power to find him out to intimate dishonour, the recourse is not lost against him.—Hodgson and Donaldson *v.* Bushby, 12th May 1783, p. 607.
- BILL OF LADING AS EVIDENCE OF TRANSFER OF GOODS.**—(4.) *Vide* Sale (11.)
- BILL OF LADING.**—*Vide* Insurance (3.) —Proof.
- BONA FIDE POSSESSION.**—*Vide* Entail (6.)
- CONSUMPTION—*Vide* Liferenter (2.) (3.)
- BOND (CONDITIONAL).**—A bond was granted by a grandfather to his granddaughter, under the condition that, in the event of her marriage without his consent, or the consent of parties named, it was to be ineffectual. She married after her grandfather's death without the consent of the parties named. Held the bond still good.—M'Lean *v.* M'Lean, 8th Feb. 1765, p. 95.
- BOND OF PROVISION.**—(1.) Held that a bond of provision granted by a brother to two sisters in addition to their family provisions was onerous, and that the sums therein were not diminished by the sisters having been alienated by their mother while in family with her.—Major Forbes *v.* Gordon, 24th March 1760, p. 43.
- (2.) Bonds of provision were granted in the exercise of the father's powers of distribution. Held that these, if accepted of, were effectual to bar the children from further claim, but that it was not proved that Katherine, one of these children, had accepted her bond, and that she was not bound so to accept.—Sinclair *v.* Sinclairs, 13th Feb. 1770, p. 199.
- (3.) *Vide* Delivery of Deed.
- CASUS AMMISSIONIS.**—*Vide* Proving the Tenor.
- CAPTURE.**—Circumstances in which held; that a Dutch vessel, while coming from a French colony during the French war, with the produce of that island to Amsterdam, was held to have been illegally captured as a neutral, neither the vessel nor the cargo, nor her papers, shewing that she was an adopted French vessel, or carrying contraband of war.—Hendricks *v.* Cunningham, 2d May 1783, p. 609.
- CHARGE, GENERAL AND SPECIAL.**—Held that a general and special charge, as the warrant of an adjudication, can

not be called on after 20 years.—  
*Irvine v. Earl of Aberdeen, &c.* 16th April 1777, p. 419.

**CHURCHYARD.**—Held in the Court of Session that by law the ground to be chosen for erecting a new churchyard, is a burden upon the heritors of the parish ; and the ground contiguous or adjoining the old churchyard is to be set off, reserving to the heritor of the ground so taken relief for the value against the other heritors. Reversed in the House of Lords, on preliminary objection that all parties interested had not been called.—*John Shaw Stewart v. Magistrates of Greenock*, 2d March 1779, p. 486.

**CLAUSE OF RETURN.**—*Vide Entail* (12.)

**CLAUSE PROHIBITORY.**—*Vide Entail* (12.)

**CLAUSE OF UNION.**—*Vide Union Clause.*

**CLAUSE.**—*Vide Devolution* (1.) (2.)

— A party left by deed “ all my “ goods, gear, DEBTS, sums of money, “ corn, cattle, and all other effects “ which belonged to him at the time “ of his death, of what nature or kind “ soever they are.” Held that this clause did not carry heritable debts secured by adjudication or heritable bond.—*Ross v. Ross*, 10 April 1771, p. 254.

— **ARBITRATION.**—*Vide Arbitration*, (1.)

**CONJUNCT PRINCIPAL CLERK OF BILLS.**  
*Vide Public Office.*

**CONDITIONAL BOND.**—*Vide Bond.*

**CONFUSIO.**—*Vide Adjudication*, (2.)

**CONQUEST.**—*Vide Approbate and Reprobate*—Held that a house purchased during the marriage was not conquest, it appearing to have been purchased with funds at the disposal of the husband at entering into the marriage, and not with funds acquired by him subsequent thereto.—*Fairie v. Watson*, 19th Feb. 1770, p. 213.

— A brother dispossessed heritable bonds to his immediate elder brother, his heirs and assignees. Both brothers died without issue. The eldest son of a brother elder than either claimed the bonds as conquest. Held in the Court of Session that he was to be preferred, as heir of conquest,

to a younger brother, who claimed as heir of line.—*Short v. Short*, 19th March 1779, p. 495.

**CONVEYANCE.**—*Vide Heirs whatsoever.*

— In purchasing a feu from the commissioners or magistrates appointed to feu out for building the new town of Edinburgh, it was stipulated that those who took feus in Prince's street would have perpetual right over these grounds now called Prince's street Gardens, and that no building would ever be erected there. Held, though the charter conveying a feu in Prince's street, was silent on this subject, that it was competent to refer to the plan and the preceding resolutions of the magistrates to that effect, to explain the extent of the feuars' rights over the grounds, with the view of shewing that they were entitled to question the right of the magistrates to feu out these grounds for building, in violation of the original feuing plan. Bill passed to try the question, reversing the judgment of the Court of Session refusing the bill and interdict.—*Deas and others v. Magistrates of Edinburgh*, 10th April 1772, p. 259.

**CONSTRUCTIVE CORRUPTION IN ARBITER**  
—*Vide Arbitration* (3.)

**CONTRACT.** (1.) A contract specified for the building of a bridge across the Clyde at Rutherglen, and enumerated the height of abutments, and dimensions otherwise, and referred to a plan, but omitted to mention anything about the depth of the foundation. From the nature of the bed of the river, which turned out to consist of loose sand, a foundation of considerable depth became necessary. Held, that as there was no binding contract on the builder to build a foundation of this nature, he was free from his contract, this omission being an error in essentials.—*Magistrates of Rutherglen v. Cullen*, 12th March 1773, p. 305.

— (2.) **INCOMPLETE**—*Vide Lease.*

— (3.) *Vide Postnuptial.*

— (4.) *Vide Arbitration Clause.*

**COPARTNERY, DISSOLUTION OF.**—Circumstances where the representatives of a deceased partner were not held liable for goods so ordered by

the other partner, in alleged ignorance of his partner's death, but sent and furnished after that event was known to the sellers.—*Cheap, &c. v. Aiton and Co.*, 11 Dec. 1772, p. 283.

— Circumstances in which a sale of stock, completed and carried through by one body of directors and not the whole, was held to liberate the partner who sold his stock to the company, from all liability as a partner, though by the rules of the company the transfer behoved to be submitted to the whole three bodies of directors, and though the company was insolvent at the time.—*Craig v. Douglas, Heron and Co.* 17th May 1781, p. 575.

**CROWN'S PATRIMONY**—Held that the superiorities and casualties of the Crown lands in Orkney and Zetland formed part of the Crown's patrimony, annexed thereto *jure coronae*, and cannot be alienated or granted away by the crown—such grants being illegal and unconstitutional, both as regards the rights of the sovereign and vassal.—*Sir Lawrence Dundas, Bart. v. His Majesty's Advocate, &c.* 14th Dec. 1779, p. 516.

**CRUIVE DYKE**.—*Vide River.*

**CUSTOMS**—Act 3 Anne c. 13, and 9 Geo. II. Indemnity Act. 18 Geo. II. Tobacco was imported from the plantations abroad by merchants in Leith, upon which the usual duties were paid. Afterwards it was exported, and, in terms of the act in such cases, a drawback of the whole duty was obtained, and the goods exported under a certificate that they were for foreign export. After the ship proceeded to sea the tobacco was clandestinely relanded: Held that the indemnity act, 18 Geo. II. did not apply to such a case, and that the tobacco was forfeited and the penalties attached.—*Grosset v. Ogilvy*, 16th Feb. 1753, p. 1.

**CURATOR**.—If a curator neglects to give up an inventory, he forfeits all right to commission—*Vide Tutory.*

**DEATHBED** (1.) An antenuptial contract of marriage, in the shape of an entail, contained a reserved faculty and power to grant provisions to

younger children on deathbed, and to affect the estate therewith. Held, reversing the judgment of the Court of Session, that bonds of provision granted on deathbed, were not reducible on deathbed, they having been executed in exercise of the reserved faculty.—*Mrs. Forbes v. Lord James Forbes*, 29th Jan. 1756, p. 8.

— (2.) A party disposed his whole estate to his heir at law, under a reserved power or faculty to burden at any time during his life, with provisions to younger children. By a codicil, bearing no date, but executed ten months before his death, he altered this disposition so as to diminish the fund for the heir; and granted also an heritable bond of provision for £1000, in terms of his reserved power to burden, nine days before his death. Held, in the Court of Session, that these deeds were reducible on the head of deathbed; but reversed in the House of Lords.—*Pringle v. Pringle*, 29th Jan. 1767, p. 130.

— (3.) Held it incompetent for the Duke of Hamilton, or Earl of Selkirk, to object deathbed to the deed 1761, calling the heirs whatsoever of the Duke of Douglas' father, and which was executed by the Duke a few days before his death; this deed being executed in virtue of a reserved faculty, and they not being in the position of heirs entitled to challenge on that ground.—*Earl of Selkirk and Duke of Hamilton v. Archibald Douglas, Esq.*, 8th March 1777, 14th April 1778, 27th March 1779, p. 449.

**DECREE** (1.) Effect of Foreign decree in seeking execution under it in the Courts of this country.—*Wilson v. Brunton, &c.*, 20th Feb. 1758, p. 11.—*Vide Foreign Decree.*

— (2.) When a decree of sale is impugned, as having been fraudulently obtained, held, that production of such decree is not a sufficient title to exclude exhibition of other writs specially called for, as the grounds and warrants on which such decree proceeded, nor a bar to the action raised for restoration of an entailed estate, sold for the em-

taike's debts, reversing the judgment of the Court of Session.—*Irvine v. Earl of Aberdeen, &c.*, 2d April 1770, p. 249—*Vide* Title to Exclude.

— (3.) Held that the circumstances averred, were not sufficient to set aside a decree of sale impugned on the ground of fraud.—*Irvine v. Earl of Aberdeen, &c.* 16th April 1777, p 419.

— (4.)—*Vide* Sale of Lands (7.) DEED (1.)—*Vide* Succession by Deed.

— (2.) Circumstances held sufficient to reduce a deed on the head of fraud and facility.—*M'Clatchie v. Brand or Burnet*, 22d March 1773, p. 312.

— (3.) A deed contained a conveyance of subjects and effects to the wife, and a particular assignation of certain bonds therein, “to her and her heirs and assignees,” with provision, that after paying debts the residue was to be enjoyed by the widow in liferent, and child in fee, giving to the widow the power of distribution and division, and also nominating her tutrix to the children. Held, where the widow had recovered payment of one of the bonds after the death of her husband, and after her second marriage, that she had only a liferent of the same, and that she could not recover payment and validly discharge that bond, either in her own right, or as tutrix for her children, her office of tutrix expiring on her second marriage.—*Cuthbert v. Mackenzie, &c.*, 13th Nov. 1775, p. 377.

— (4.) Four several deeds were executed at intervals, conveying an estate to different parties other than the heirs of investiture, and challenged on the head of incapacity, fraud, and circumvention; Held the deeds irreducible, as there was no conclusive proof of incapacity, fraud, or circumvention.—*Ross v. Ross*, 9th May 1776, p. 393.

— (5.) A party executed a deed in 1764, conveying his whole heritable and moveable estate to his four sisters and their heirs male, reserving power to revoke, but declaring it to be good in so far as not revoked.

He afterwards married, and executed at same time (1766) a new deed, leaving his whole heritable and moveable estates to the heirs of that marriage. There was no express revocation of the former deed. He afterwards died, leaving a son, who only survived his father three months: Held, on failure of the issue, that the destination of the first deed remained good, and excluded the heirs at law as such.—*Allan or Smith and Husband v. Sinclair and Attorney*, 13th Nov. 1776, p. 403.

— Capable of conveying land estate.—*Vide* Entail (12.)

DELIVERY OF DEED.—Held that a bond of provision granted by a brother to two sisters, in addition to their family provisions, was to be presumed in law delivered of its date, unless the contrary be proved, although it had not been in point of fact delivered to them, and there was no clause dispensing with delivery, and that the same bond was onerous.—*Forbes v. Gordon (Maitland's Trustee)*, 24th March 1760, p. 43.

DEVOLUTION—(1.) Held, where a party takes an entailed estate on condition of devolving one, he already possesses on the next heir of entail, that he is bound to do so to the heir pointed out by the entail, although the party who succeeds to both may have younger sons nearer the line of succession, whose possession would carry out the intention of the maker, of having the two estates separately and distinctly possessed.—*Lawrie v. M'Ghie, &c.*, 17th March 1773, p. 309.

— (2.) Sir Robert Hay of Linplum executed an entail, with this devolution clause, “That if any of the heirs of entail before mentioned, or their descendants, shall happen to succeed to the estates or titles of Marquis of Tweeddale, Hay of Drummelzier, Duke of Roxburgh, then and in that case the right to my lands and others before mentioned, in the person of such heir of entail, shall cease and terminate at Whitsunday or Martiuas next, after succession, or in his option next after he shall have a second lawful

" son attained to the age of fourteen " years complete," &c., and the same " shall fall and devolve to the said se- " cond lawful son, and to his heirs " male, and so on." The event here specified happened, but held that the party so succeeding to those titles and estates, was entitled to avail himself of the option of retaining both estates until the birth of a second son, which was then probable. *Hay v. Marquis of Tweeddale*, 6th April 1773, p. 322.

**DISPENSATION CLAUSE**—*Vide Union.*

**DISPOSITION** (1.) **Absolute or in Trust.**

A party dispossessed certain lands to his agent, in order, as he stated, to qualify him to vote in the county election, but held no written obligation under his hand to redispone. Held that the absolute disposition, together with the law agent's accounts, amounting to £1400, due him, foreclosed all idea of trust, unless this trust were proved by writing under the trustee's hands, in terms of the act 1696.—*Sir John Douglas, Bart. v. Hugh Dalrymple, &c.*, 26th Jan. 1770, p. 187.

(2.) An absolute disposition was granted to lands, bearing to be sold for a fair and adequate price then advanced, with a backbond of same date, allowing redemption of the lands within five years, which having expired without payment: Held, after the expiry of that term, though no declarator of the irritancy was brought, that the lands were to be held irredeemably for the price—that sum being a fair value at the time.—*Boyd v. Steel*, 10th March 1775, p. 368.

**DISCHARGE**.—Discharge of one child's provision, how it operates as to the other children.—*Vide Provision.*

Implied—*Vide Obligation.*

*Vide Bankruptcy*, (1.)

**DIVORCE**.—In order to found a relevant defence of *remissio injuri e*, it must be proved that the offended party was in the certain knowledge of particular acts of adultery, such as could found a divorce, and thereafter co-habited with the guilty party.—*Legrand v. Maria Stewart or Legrand*, May 1782, p. 596.

**DONATIO INTER VIRUM ET UXOREM**—

A husband procured a renunciation from his wife of her provision, secured preferably over his estate, in order to allow these to be sold, and the price paid to his creditors. Held the wife not bound by the renunciation, although third parties were interested, and had agreed to abate claims on her granting it.—*Lady Cranstoun v. Scott and Others*, 21st April 1777, p. 425.

**ENTAIL** (1.) An imperfect resolutive clause appearing in an entail: Held the entail not good against debts, though contracted in contravention of the prohibitions. But also held that the next heir substitute, succeeding to the contravener, had good action against him and his representatives to purge the estate of such debts.—*Hepburn and Tutor v. Congalton and Others*, 6th Dec. 1758, p. 17.

(2.) When an estate entailed is possessed by the last substitute, it becomes in him a fee simple estate, when failing him, it devolves upon heirs whatsoever.—*Earl of Ruglen and March v. Sir Thomas Kennedy*, 19th May 1760, p. 49.

(3.) Held that the act 1685, authorizing the recording of entails, applied to entails executed before the act was passed, and that such entails were not good against creditors unless recorded. *Earl of Rothes v. Philip*, 16th Jan. 1761, p. 52.

(4.) An entail contained no express prohibitions against granting leases, and the heir granted leases of 11, 19, and 38 years duration: Held, in a reduction of the leases, that they were good against singular successors, the entail not having been recorded, although executed before the date of the act 1685.—*Lord Kinnaid v. Hunter and Others*, 10th Feb. 1765, p. 97.

(5.) An entail contained a general clause, prohibiting the heirs from doing any fact or deed in prejudice of the succeeding heirs of entail, but no special prohibition against sales. Held the general clause not sufficient to protect against sales.—*Young v. Nisbet*, 21st Feb. 1765, p. 98.

(6.) An heir of entail made up

titles disregarding the entail, and sold the estate, under the supposition that by the destination he was fair. Held, (1.) That he was substitute heir of entail, and as sales were prohibited, he was not entitled to sell the estate, and sale reduced. (2.) Also that a party can make a valid entail of an estate, although not infest; but that the heir substituted, in completing his title under the entail, must expedite a general service, so as to carry right to the tailzie. (3.) That as the purchaser could not plead ignorance of the records, where the entail was recorded, so he could not plead *bona fides*, or the positive prescription. (4.) That the entail might be recorded after the death of the entainer, at suit of a remote substitute heir of entail.—Lord Napier *v.* William Livingstone, 11th March 1765, p. 108.

— (7.) An entail was taken to the makers (husband and wife), and the longest liver in liferent, and to their eldest son in fee; whom failing, the second son, and with a prohibition against altering the order of succession, but no restraint against selling or charging the estate with debt. The eldest son, who succeeded after the maker, was an idiot. Held, that the maker could, on such an event, alter the order of succession, so as to make the estate go direct to the second son.—Wedderburn *v.* Halket, &c., 19th March 1770, p. 231.

— (8.) Held, where the prohibitory, irritant and resolutive clauses in a strict entail, are directed against *heirs of entail merely*, these terms do not include the institute, as he is not an heir of entail, but a special donee; reversing the judgment of the Court of Session.—Edmonstone of Duntreath *v.* Edmonstone, 15th April 1771, p. 255.

— (9.) In an entail power was given to the heirs of entail to burden the estate with provisions to their husbands, wives, and children, "such as the estate could conveniently bear and allow." In 1748 the heir in possession burdened it with a provision to the same party for

£1000. Held, in an action for payment of both bonds, that the heir in possession had not exceeded his powers, and that, by the first bond, his powers were not so exhausted as to prevent him from granting the second—Bruce *v.* Carstairs, 11th May 1773, p. 329.

— (10.) Leases, by the entail of the estate, were only to be granted for the lifetime of the grantor, or for 15 years: Held good though granted for nineteen years, and though the grantor died before that term expired. Carre *v.* Cairns, 6th May 1774, p. 343.

— (11.) An entail executed in the shape of a procurator of resignation, upon which charter was obtained, and this charter, but not the procurator, produced judicially before the Court, and recorded in the register of tailzies: Held that this was not perfect registration of the entail, and that the charter was not the original entail, but the procurator was.—Irvine *v.* Earl of Aberdeen, &c., 16th April 1777, p. 419.

— (12.) The ancient investiture 1630, of the Douglas estates, restricted the destination of these estates to the heirs male of Archibald Douglas' body, "whom failing, to return to the Earl of Angus, his father, and his heirs male of tailzie," with prohibition to alienate or to contract debt; but no prohibition against altering the order of succession. Several deeds were executed by Marquis James Douglas, one of 9th March 1699, which confined the succession to heirs male, and favoured the succession of the Earl of Selkirk as such. A subsequent deed, 11th March 1699, introduced heirs female, together with one executed on 28th October 1699, and others of 1716, 1718, and 1726. He afterwards revoked these deeds, by a deed 16th October 1744, and declared that his estates and honours should descend to the heirs of the ancient investitures. The Duke of Douglas (Marquis' son), afterwards executed a deed or contract of marriage 1759, which called, after heirs male of his own body, "his own nearest heirs

"and assignees whatsoever." On deathbed he executed a deed (1761) calling the heirs whatsoever of his father, which included Lady Jane Douglas and her son, the claimant. Held, (1.) That Marquis James was faiar, and that the clause of return, and the prohibitory clause in the entail, did not and could not prevent him from altering the order of succession. (2.) That the clause of return, and the prohibitory clause, were cut off, both by the negative and positive prescription, on the title and possession had thereon under the charter 1698. (3.) That the deed of nomination of 11th March 1699, and subsequent deed 28th October 1699, contained the nomination of heirs referred to in the charter 1707, and, consequently, the Earl of Selkirk's claim under the deed 9th March 1699 was ineffectual and lost by the negative prescription. (4.) That the objection to the sasine 1707, on account of the witnesses not signing each page, but only the last page of the deed, was not good in this case. (5.) That the possession had, on this charter and sasine, entitled Archibald Douglas, the present claimant, to the benefit of the positive prescription, against the restrictions in the contract of marriage 1630, and the deed of nomination, dated 9th May 1699. (6.) That the deed 1744 was no proper or legal settlement of the laud estate, but a revocation or deed merely of a testamentary nature, incapable of conveying land estate; and that the appellant, the Duke of Hamilton, had no claim under it; and further, that the marginal note, consisting of the words "and female," as it appears upon the face of the said original deed of October 1744, and the words "*after my death*," made no difference in the question. (7.) That by the legal import of the terms, "*heirs and assignees whatsoever*," in the Duke of Douglas' contract of marriage 1759, heirs of line were meant, and Archibald Douglas, as heir of line, was called to succeed in preference to the nearest heir male.—Earl of Sel-

kirk and Duke of Hamilton *v. Doug-*  
*las, &c.* 8th March 1777, 14th April  
1778. 27th March 1779, p. 449.

— (13.) How far leases for four nineteen years duration of an entailed estate were reducible as an alienation thereof. Held, in the special circumstances, that leases for the grantor's life and the life of the next heir who ratified them were good, but that the leases of the mansion house, offices and gardens, and the lease of the lands beyond the lifetime of these parties, were bad, and reduced accordingly.—*Orme v. Leslie*, 25th Feb. 1780, p. 533.

— (14.) *Vide Antenuptial Contract—Reserved Faculty*, (4.)

— (15.) *Vide Revocation*.

**EXCLUSIVE TITLE.**—*Vide Decree of Sale* (2.)

**EXERCISE OF POWER IN ENTAIL.**—*Vide Entail* (7, 9.)

**EXCEPTIONABLE TITLE.**—*Vide Sale* (5.)

**ERROR IN ESSENTIALS.**—*Vide Contract* (1.)

— Where a liferentrix had entered into an agreement, restricting her liferent rights, in the belief, as was expressed in the agreement, that her daughters' bonds of provision were reducible, as executed on deathbed, and stipulating a restriction of her liferent rights, on condition of the heir not challenging these bonds on the head of deathbed. Held the liferentrix entitled to be restored against this agreement, and to claim her rights as originally settled.—*Lady Dowager Forbes v. Lord James Forbes*, 29th Jan. 1765, p. 48.

**FATHER'S POWERS OF GRANTING PROVISION TO CHILDREN OF SECOND MARRIAGE.**—*Vide Marriage Contract* (1.)

**FACILITY.**—*Vide Marriage Contract* (2.)

**FACULTY TO BURDEN.**—*Vide Deathbed* (2.)

**FACULTY RESERVED** (2.)—Shortly after his marriage, a party executed a postnuptial contract, settling his estate on the heirs male of the marriage, whom failing, on the heirs female of that marriage, reserving power, in case of there being no heirs male, "and two, three, or more

daughters," to settle the estate on either of the daughters. He had no sons, but there were three daughters of the marriage, the two eldest of whom predeceased their father. He afterwards executed a new deed, settling the estate upon the *second* and *third sons* of the *youngest* daughter. Held, in the Court of Session, that this deed did not fall within the special faculty reserved, and was reducible.—*Cunyngham v. Cunyngham*, May 1777, p. 434.

— (1.) *Vide* Deathbed (1.)

— (3.)—*Vide* Antenuptial Contr. act.

**FACTORY.**—*Vide* Recal of Factory.

**FEU DUTY.**—*Vide* Superior and Vassal.

**FETTERS.**—*Vide* Entail (8.)

**FIAR.**—*Vide* Entail (12.)—Duke of Hamilton *v.* Douglas, 8th March 1777, 14th April 1778, 27th March 1779, p. 449.

— (2.)—*Vide* Entail (6.)

— (3.)—Fee and liferent.—Circumstances in which the terms of a destination to a parent in liferent, and to "the heirs of her body in fee," were held to give the mother the fee of the estate conveyed.—*Graham v. Graham*, 17th March 1780, p. 537.

— (4.) Held that a lease may be granted by a fiar, after he had granted the same lands in liferent locality to his wife, to take effect in the event of her surviving him.—*Stewart v. Countess of Moray*, 24th March 1773, p. 317.

**FILIATION.**—Douglas Cause, 27th Feb. 1769, p. 148.

**FORFEITURE.**—Held that forfeiture was no *non valens agere* entitling to deduction from the period of prescription.—*Campbell v. Campbell, &c.* 10th February 1770, p. 193.

**FOREIGN DECREE.**—(1.) *Vide* Decree (1.)

— CERTIFICATE AND DISCHARGE (2.)—*Vide* Bankruptcy (1.)

— (3.) Effect of foreign decree when founded on in the Courts of Scotland.—*Sinclair v. Frazer*, 4th March 1771, p. 253.

**FOREIGN SUCCESSION**—*Vide* Prescription.

**FRAUD.**—*Vide* Proof.

**GRASS GLEBE.**—In the selection of lands, out of which to design a grass glebe to the minister. Held, (1.) That kirk-lands, though for sometime turned into culture, were to be designed in preference to other kirk-lands in pasture, at a greater distance from the manse. (2.) That the minister had a right to insist on such designation, though the proprietor of the arable land had agreed, in a division of a common within the parish, to give the minister the right of pasture, for one horse and two cows in lieu of grass glebe, and the minister had enjoyed this right on the part of the common allocated to that heritor, for time immemorial.—*Wilkie v. Simpson*, 14th March 1770, p. 222.

**GUARANTEE** (1.)—A guarantee for a certain party, a partner in a firm, held not to operate as a guarantee for this firm; and though the guarantee was handed over by the obligant, to be sent to the parties requiring it; held that the bankruptcy of the party, for whose benefit it was granted, before the guarantee reached their hands, entitled the obligant to recal it.—*Douglas, Heron & Co. v. Baron Grant*, 1st June 1774, p. 351.

— (2.)—Two parties became guarantees for a company, on the latter depositing bills due to them in their hands as a security. This was done, and a list of the bills drawn out and handed over, and a receipt granted by the guarantees. They were immediately re-delivered to one of the partners of the company to keep for them. He discounted some of them for company purposes. Held, on failure of the company, that the guarantees, though they had thus parted with possession, were to be preferred to an arresting creditor.—*M'Dowal and Gray v. Annaud and Colquhoun's Assignees*, 28th Feb. 1776, p. 387.

"HEIRS WHATSOEVER"—*Vide* Adjudications (2.)

"HEIRS AND ASSIGNEES WHATSOEVER." Held by this clause heirs of line were meant.—*Vide* Entails (12.)

**HEIR AND EXECUTOR.**—Which of them entitled to rents in arrear at death of predecessor.—*Vide Apparency.*

**HEIRS.**—Import of the term “heirs,” as used in a destination.—*Chatto v. Baillie*, 26th March 1770, p. 243.

**HEIRS ENTITLED TO CHALLENGE ON DEATHBED.**—*Vide Entail* (12.)

**HERITABLE CREDITOR.**—Held that when a preferable heritable creditor gets, by his diligence, possession of the estate over which his own and other securities extend, a second creditor, who offers payment of the preferable debt so secured, is entitled to come in his place, and to demand an assignation to his debt; also, held this doctrine to apply to a widow who had her liferent jointure secured over the estate, and that she was, in the eye of law, a creditor entitled to such an assignation on offering payment.—*Govan or Givan v. Simpson*, 26th March 1759, p. 27.

**HOLDING.**—*Vide Superior and Vassal.*

**HUSBAND AND WIFE.**—*Vide Aliment* (1.)

**INCAPACITY.**—*Vide M'Clatchie v. Burnet*, 22d March 1773, p. 312.

**INFECTION.**—*Vide Union Clause.*

**INVENTORY.**—*Vide Tutory.*

**INSTITUTE OF ENTAIL NOT AN HEIR OF ENTAIL, BUT A DISPOREEE.**—*Vide Entail* (8.)

**INSOLVENCY.**—Held, on proof of a buyer's insolvency, that the sale was void, and the seller entitled to reclaim his goods while *in medio*.—*Campbell, Robertson & Co. v. Shepherd*, 8th Nov. 1776, p. 329.

**INTENTION.**—*Vide Will.*

**INTERDICTION**—*Vide Negotiorum Gestor.*

**INTERRUPTION OF PRESCRIPTION.**—*Vide Positive Prescription.*

—*Vide Prescription* (4 and 5.)

**INTERRUPTION**—*Vide Prescription* (Negative.)

— Held, granting a precept of *clare constat*, to complete the heir's right to a wadset, sufficiently interrupted the negative prescription as to the wadset debt.—*M'Neil v. Yorston*, *Vide Note* at p. 276.

**INTEREST.—OBJECTIONS TO WITNESSES ON GROUND OF.**—*Vide Witness* (3.)

**INSURANCE** (1.) Circumstances in which held deviation from the course of the voyage voided the policy of insurance on a ship and cargo.—*Elliot and Others v. Wilson & Co.* 25th November 1776, p. 411.

— (2.) Circumstances in which the party claiming loss on the insurance of a vessel, had an insurable interest, sufficient to entitle him to recover under the policy.—*Alston, Elliot, Colquhoun, and Others v. Colin Campbell & Co.*, 3d March 1779, p. 492.

— (3.) Insurance for £1000 was effected on ship and cargo, lost on her voyage from Virginia to Barbadoes. The son of the insured was master. The policy proceeded on false information of the value of the cargo, which was sent by the son to the insured, but without the latter's connivance or knowledge. The Court of Session held, that the bill of lading was not good evidence of the value and quantities of goods. But the question was, Whether, without reference to that value, he was entitled to recover the sum named in the policy, or was only entitled to the ascertained value? Held, reversing the judgment of the Court of Session, that he was entitled to recover the sum named in the policy.—*M'Nair v. Coulter and Others*, 15th February 1773, p. 297.

— (4.) Circumstances in which it was held that where a letter of advice is concealed from the insurer, which only refers to matters of public notoriety, known to all insurance offices as affecting the risk in insuring a particular voyage, that such concealment will not void the policy.—*Thomson v. Buchanan and Others*, 13th March 1782, p. 592.

— (5.) Held that deviation of the ship in the course of the voyage insured, must be wilful in order to void the policy, and that accidental or involuntary deviation will not have that effect. Circumstances in which held wilful deviation not proved.—*Graham v. M'Nair*, 29th March 1770, p. 244.

— (6.) *Insurable Interest.*—*Vide Sale* (12.) and *Insurance* (2.)

**JOINT ADVENTURE.**—*Vide Society.*

**JURISDICTION.**—(1.) *Vide Appeal* (2.)

— (2.) *Vide Stipend.*

— (3.) Opinion indicated in the House of Lords, that the Admiralty Court in Scotland had no jurisdiction to try the question as to the capture of a foreign vessel, seized during the French war, as suspected to carry contraband of war for the enemy, but that it belonged to the High Admiralty Court of England.—*Hendricks v. Cunningham*, 2d May 1783.

— (4.) *Vide Appeal* (1.)

— (5.) *Vide Appeal* (3.)

— (6.) *Vide Salmon Fishing* (3.)

**JUS MARITI.**—Where a party conveyed his heritable and moveable estate to his daughter in trust, for behoof of herself and children, excluding her husband's *jus mariti* in the event of his insolvency. Held that his creditors were not entitled to claim any of his moveable estate, the same being vested in the daughter; but that they were entitled to claim the rents of the heritable, and *interest* of the moveable estate, up to the date of the husband's insolvency, on which event, his right of administration ceased, in terms of the express provision in the settlement.—*Annand and Colquhoun and Assignees v. Chessel, &c.*, 24th March 1775, p. 369.

**LEASE** (1.)—A lease was granted for 1140 years, for a valuable consideration given, besides a yearly tack-duty. Sasine and possession followed. Held, on the forfeiture of the estate, that the lease was good against the grantor, and also against the Crown, reversing the judgment of the Court of Session.—*Frazer v. His Majesty's Advocate*, 30th March 1762, p. 66.

— (2.)—Terms of a lease of coal, under which held that the tenant had right to communicate the level in the coal grounds to other adjacent collieries, also let to him; but reversed in the House of Lords, and held, that by the lease

the tenant had no right to do so, without the consent of the landlord or proprietor.—*Wauchope v. Sir Archibald Hope, &c.*, 28th January 1773, p. 286.

— (3.)—An offer for a lease was made in writing by several tenants, and the landlord's factor wrote, in answer to the subfactor, through whom the offers had come, that the landlord had read over the offers, and that the rent and duration of the leases were agreed to, but other points not fixed. He thereafter wrote as to these points, and with instructions to get the lease drawn out and signed by the tenants on stamp. This was done, and sent to him for signature, but the landlord kept it for two years, without signing it. In the meantime, he had allowed possession to be taken by the tenants; and on the faith of it they had proceeded to make dykes, and other improvements, and had paid two years increased rent. The Earl died without signing the lease. Held, in all the circumstances of the case, that the lease was as effectual and binding as if it had been signed by the Earl.—*Stewart v. Countess Dowager of Moray, &c.*, 24th March 1773, p. 317.

— (4.)—*Vide Arbitration* (2.)

— (5.)—*Vide Entail* (10.)

— (6.)—Construction of a clause in a lease, granted for 57 years, having a clause to renounce at the end of every 19 years, in the option of the lessor or lessee. Held, this not to import an option, to be exercised by the landlord alone, without the consent of the tenant. But reversed in the House of Lords, and remitted to the Court of Session to take proof of what was the understanding of the parties on entering into the lease, the clause itself being ambiguous. *Lord Falconer v. Taylor, &c.* 7th April 1775, p. 373.

— (7.)—A lease for 57 years, under conditions of a break at the end of the first 19 years, or “to prorate the same for three years in “the option of the said Lord Halkerton and the said David Lawson.” Held that the landlord was not en-

titled to insist for a termination of the lease, without the consent of the tenant.—*Lord Falconer v. Lawson*, 3d February 1778, p. 442.

— (8.)—Lease granted by an insolvent.—*Vide Bankruptcy* (2.)  
— (9.)—Do.—*Vide Bankruptcy* (3.)

— (10.)—Irritancy of. A lease provided that if two terms rent were allowed to be “resting and owing” unpaid at one time, the tack “should *eo ipso* become void and null,” with a fifth part of termly moiety in case of failure. The tenant fell four years in arrears of rent. In an action brought under the annulling clause in the lease, held the irritancy purgeable at the bar; and that the penalty was not exigible.—*Hogg v. Hogg*, 14th Feb. 1780, p. 516.

— (11.)—In a lease of coal, where the level of the pit had been communicated by the lessee to neighbouring collieries, without the consent of the proprietor; Held that the same must be shut up, and in the question as to the recompense, also held that the same must be adequate to the benefit which had been enjoyed by the use of such level. On appeal, remitted for reconsideration.—*Wauchope v. Earl of Abercorn and Sir Archibald Hope*, 21st February 1780, p. 519.

— (12.)—Leases for four nineteen years duration of an entailed estate were granted; and an action brought to have them set aside as an “alienation” of the estate, the entail containing prohibitory and irritant and resolutive clauses, against selling and alienating the same. Held the leases good, in the special circumstances, for the grantor’s life, and the life of the heir who ratified them, but bad and reducible *quoad* a period beyond the lifetime of these parties. Also, that the lease of the mansion house, offices and gardens, &c. were bad, and reduced accordingly.—*Orme v. Leslie*, 25th February 1780, p. 533.

**LEGACIES, VESTING OF.**—A testator by will, bequeathed one-half of his personal estate to his two nephews,

declaring that his will was to take place at the death of his wife, and that, until that event, she was to have the liferent interest thereof. The nephews survived the testator, but died before the death of the life-renter. Held the legacies to vest in the nephews.—*Duncan v. Fowke*, 5th February 1773, p. 290.

**LIFERENT AND FEE.**—*Vide Fiar* (3.)

**LIFERENTER** (1.)—Lady Forbes was left the liferentrix of her husband’s estates, together with the superiorities of the lands, and patronages thereto belonging. On her husband’s death, several questions arose, and *inter alia* it was held, that as liferentrix of both the Lordship of Forbes, as well as the superiorities thereof, she was entitled to enter vassals, reversing the judgment of the Court of Session. 2d, That she, as liferentrix, had no claim against her daughters for alimenting them until their own provisions fell due, they being almented *aliunde*.—*Lady Dowager Forbes v. Lord Forbes*, 18th February 1760, p. 36.

— (2.) Katherine Maitland took possession of the estate of Pitlochie, but, in a competition with Major Forbes, she was obliged to give it up, he being found to have a preferable right. An action was then raised, founded on the bonds of provisions. Held that the rents of the estate, during her possession, were *bona fide percepti et consumpti* by her, and she not accountable therefor. But that she was not liable for behaviour as heir, but that the appellant, Major Forbes, was liable for principal and interest of the sister’s bonds,—that these were not prescribed, and fell to be paid, under deduction of two-thirds of the annual-rents, from their mother’s death to the death of their brother.—*Major Forbes v. Gordon*, 24th March 1760, p. 43.

— (3.) Where the husband and wife, by marriage articles, conveyed the estate to themselves, and the survivor of them, for the wife’s liferent

use allenarily, reserving power to grant provisions to daughters to the extent of £3000, and failing the husband exercising this power, to the wife. Held, 1st, That though the husband had granted provisions to his daughters in exercise of this faculty, to the extent only of £2000, that the wife was entitled, after his death, to execute an additional bond to the extent of £1000. 2d, That where the liferentrix had entered into agreements, restricting her liferent in error that she was entitled to be restored; and, 3d, That *bona fide percepti et consumpti* was not pleadable, and the respondent accountable for the whole rents, feu-duties and casualties, since the date when her right accrued, reversing the judgment of the Court of Session. But, 4th, That she was liable for the interest of the heritable debts of Pittachie and Pittendriech. *Lady Dowager Forbes v. Lord James Forbes*, 29th January 1765, p. 84.

**LOCALITY LANDS.**—Held that a lease may be granted by a fiar, after he had granted the same lands in liferent locality to his wife, to take effect in the event of her surviving him.—*Stewart and Others v. Countess Dowager of Moray and Earl of Moray*, 24th March 1773, p. 317.

**Locus PENITENTIA.**—*Vide Sale* (4.)

**MANDANT'S POWERS, RECAL OF.**—*Vide Presentation.*

**MARRIAGE** (1.) **Constitution of.**—Circumstances in which marriage held to be constituted by cohabitation and acknowledgment.—*Macalister v. Dun*, 2d May 1759, p. 29.

— (2.) Held where marriage was sought to be established by cohabitation and habit and repute, that proof of cohabitation in the Isle of Man, where a different law prevails, did not constitute marriage in Scotland.—*Macculloch v. Macculloch*, 16th May 1759, p. 33.

— (3.)—Circumstances in which a written declaration of marriage, written after pregnancy, was not held to constitute marriage, it appearing to have been granted to serve

a mere purpose.—*More v. M'Innes*, 25th June 1782, p. 598.

— — — **ANTENUPTIAL CONTRACT OF—**  
*Vide Deathbed* (1.)

— — — **CONTRACT. FATHER'S POWERS**

— A father, in his son's contract of marriage, conveyed his estate to his son and his intended wife in life-rent, and the heir male of that marriage in fee. The son thereafter executed an entail of the estate to George, his eldest son, and heir-male of the marriage, and a series of other heirs-substitutes, reserving power to burden and alter. After his wife's death he married a second time, and provided in the marriage settlement for the issue of the second marriage out of separate estate. He thereafter executed additional provisions, in favour of the children of the second marriage, and burdened also the estate conveyed to the heir-male of the first marriage, as well as granted a lease of the same for 40 years. The heir-male of the first marriage being facile, was prevailed on to ratify the entail, and these subsequent deeds of provision. Held, that the son of this facile person was not barred, by his father's deeds of ratification, from challenging the entail and provisions charged on the estate, in favour of the children of the second marriage, on the ground that they were granted by a weak and facile person.—*Dallas v. Dallas*, 4th February 1765, p. 91.

— — — (3.) Contravention of marriage contract—*Vide "Service,"*— and Passive Title.

— — — (4.) *Vide Approbate and Re-probate.*

— — — (5.) *Vide Antenuptial Contract MINORITY—Vide Prescription* (1.)

**NEGOTIORUM GESTOR.**—Held a party who acted voluntarily, and without any legal authority for another, in changing the security of money lent, was liable, on the failure of the new borrower, notwithstanding the person for whom he acted was of age, was present on the occasion, and consenting to the whole transaction, but was unable to manage his own affairs

from weakness of mind, and was soon thereafter interdicted.—*Graham v. Ker*, 9th March, 1758, p. 13.

— *Vide Sale of Succession* (8.)—  
Obligation.

NEGOTIATION.—*Vide Bill.*

NOTARIES.—Signing Deed by aid of.—  
*Vide Wadset.*

NEGATIVE PRESCRIPTION.—*Vide Prescription.*

OATH OF BANKRUPT.—*Vide Bankrupt's Oath.*

OBLIGATION.—*Vide Sale of Succession.*

OLD VALUATIONS, RATIFICATION OF.—  
*Vide Valuations.*

OPUS MANUFACTUM.—*Vide Servitude, (3.)*

ONUS PROBANDI.—*Vide Service.*

OVERSMAN.—*Vide Arbitration* (3.)

ONEROUS BOND.—*Vide Delivery of Deed.*—*Vide Provision.*

PAROLE (1.)—Held that by the terms, “heirs and assignees whatsoever,” in the Duke of Douglas’ contract of marriage 1759, the heir of line was meant, and Archibald Douglas, as heir of line, was entitled to succeed in preference to the nearest heir-male, and that parole evidence was incompetent to give a different meaning to this clause of destination. *Earl of Selkirk and Duke of Hamilton v. Douglas*, 8th March 1777, 14th April 1778, 27th March 1779, p. 449.

— (2.) There was an ambiguous clause in a lease, which, on being made the subject of dispute, the Court of Session interpreted in favour of the landlord. Reversed in the House of Lords, and remitted to the Court below, to allow proof of what was the understanding of the parties on entering into the lease, the clause being ambiguous. *Lord Falconer v. Taylor and Others*, 7th April 1775, p. 373.

— (3.) Held, where a decree arbitral set forth, that the two arbiters had differed in opinion, that parole was competent to prove whether a difference took place or not, notwithstanding the decree arbitral set forth that such difference had

occured.—*Colquhoun v. Corbet*, 27th July 1784, p. 626.

PARTIAL COUNSEL.—*Vide Witness.*

PART AND PERTINENT.—*Vide Servitude, (1.)*

— *Vide Property, Right of.*

PASSIVE TITLE.—Held that as the ancestor died in appreancy, in regard to the estate of Moncrieff, the heir was entitled to pass him over, and serve heir to his grandfather, without being liable for his debts; and as to the provision or estate of £555. 11s. 1d., and 100,000 merks, he was not liable passive, he not having taken benefit from that estate, and that a sum of £2500 received to ratify these deeds, did not make him liable passive.—*Blair and Others v. Sir William Moncrieff, Bart.* 5th May 1766, p. 126.

— *Vide Liferenter* (2.)

PATENT.—A patent for an invention in Scotland is invalidated by proof of previous use in England.—*Dr. Roebuck and Garbet v. Stirlings*, 27th May 1774, p. 346.

PATRONAGE (1.)—Held the right of patronage to revert back to the Crown, by 40 years possession of the right of presenting, although an ancient right existed in a subject on which no possession had followed.—*His Majesty's Advocate v. Earl of Home*, 7th March 1759, p. 25.

— (2.) Circumstances in which held that the Crown was divested of the right of patronage, although in the original titles in favour of the party, the words of the grant were general and not special, and although the exercise or possession of the right was not always enjoyed by him, but sometimes by the Crown, as coming in place of the Bishop.—*His Majesty's Advocate v. Archibald Douglas*, 4th March 1765, p. 104.

— (3.) On a vacancy occurring in the parish of Aberlady, the Crown and Lord Portmore respectively claimed the right to present to the vacant benefice. Held Lord Portmore had best right to present, and that such right could not be lost by *non utendo*.

—*Rev. Mr. Hepburn v. Earl of Portmore*, 12th March 1770, p. 218.

**PATRON.**—Where a patron, residing in a foreign country, had appointed commissioners, with powers to present to vacant churches, the latter presented a party a day before the patron himself presented another party. Held the presentation by the commissioners, in virtue of the powers delegated to them, was good, and to be preferred to the patron's own presentation, and that the right of patronage may be exercised by delegates so appointed.—*Rev. Mr. Tait v. George Skene Keith and Others*, 30th March 1778, p. 447.

**PATRIMONY OF THE CROWN.**—*Vide Superior and Vassal.*

**PEERAGE.**—Held, (1.) where no express limitation of the grant appears, the dignity is always presumed to descend to the heir-male. 2d. That the resignation and new charter 1671, did not comprise or extend to the honours, but only to the estate.—*Kennedy v. Earl of Ruglen and March*, 26th January 1762, p. 55.

**PENALTY.**—A penalty of a fifth part more of the yearly rent payable, was inserted in a lease, in case of failure. The tenant fell four years into arrear. Held the penalty not exigible.—*Hogg v. Hogg*, 14th February 1780, p. 516.

**POSSESSION ON ADJUDICATION.**—*Vide Heritable Creditor.*

— **BONA FIDE.**—*Vide Liferenter (2.)*

— **IMMEMORIAL.**—*Vide Servitude.*

— **Vide Lease (3.)**

**POSTNUPTIAL CONTRACT.**—*Vide Faculty Reserved (2.)*

**PRÆPOSITUS NEGOTIIS.**—*Vide Society.*

**PRESCRIPTIVE POSSESSION.**—*Vide Patronage (1.)*

**PRESCRIPTION (1.)** Held that debts acquired by a husband affecting his wife's estate, do not prescribe during marriage; and that prescription did not run against the bonds so acquired, during the minority of the person for whose behoof they were acquired.—*Major Forbes v. Gordon*, 24th March 1760, p. 43.

— **POSITIVE (2.)** Question, Whether citation on a summons of exhibition *ad deliberandum*, will interrupt prescription? Point not decided. But held that forfeiture for

joining in the rebellion was no *non valens agere* in the eye of law. That in counting deduction of minorities, the time within which a posthumous child was *in utero*, is not to be counted; and that the prescriptive possession could not be affected by jointures or liferents, on part of the estate, at the time he acquired right to the same, if the whole lands liferented are conveyed to him, and possession had otherwise.—*Campbell v. Campbell*, 10th February 1770, p. 193.

— (3.) Held infestment in the superiority of lands, with possession thereon for 40 years, was a good title where the property of the lands was also in the same party, to acquire the fee of the lands by the positive prescription.—*Bruce v. Bruce*, 7th April 1772, p. 258.

— (4.) A bond was granted to a party, and had lain over until within a few months of 40 years, when decree *cognitionis causa* followed by decree of adjudication, were obtained. A claim was made on this debt, 40 years after the date of this adjudication. Held that calling the creditor in an action of reduction, declarator, and extinction of the debt, raised by a co-creditor, to which the debtor was no party, within the 40 years, and appearance of the creditor made therein, with production of his bond and adjudication to support his debt, were not sufficient to interrupt the negative prescription, in terms of the statute thereanent.—*His Majesty's Advocate, v. Jean Hay and Children*, 24th April 1758, p. 266.

— (5.) A bond was granted by a party to his creditor, upon which adjudication, charter, and infestment followed, this adjudication comprising several other separate debts; the bond debt lay over for 66 years, when claim was made, and the negative prescription pleaded against the adjudication. Held that a claim made before the Government Commissioners on forfeited estates, and registration thereof, together with a submission, followed by decree arbitral, entered into by the debtor with one of the creditors in the separate debts comprised in this ad-

judication, and assignation of that debt by him to the debtor within the 40 years, were sufficient to interrupt the negative prescription in regard to the debt, it being one of those comprised in the adjudication thus acknowledged by the debtor.—*His Majesty's Advocate v. Jean Hay*, 26th April 1758, p. 272.

— (6.) Deeds were challenged on the head of fraud and incapacity, circumstances in which it was held, that prescription did not apply so as to exclude the action.—*Ross v. Ross*, 9th May 1776, p. 393.

— (7.) (POSITIVE.) A conveyance by a charter was made of certain parts of an estate, *ex facie* absolute, and bearing to be for a price then paid, eight days before its date, a wadset had been granted of the same lands in favour of the same party, which obliged the party to grant a letter of reversion. No letter of reversion was adduced, and no appearance of it on the records. The positive prescription and possession followed. Held, in the Court of Session, that the wadset right and charter qualified each other, and were to be read as one deed, and that the right was redeemable. Reversed in the House of Lords, and held that prescriptive possession on the absolute right fortified the appellant's title, and that the right was irredeemable.—*Sutherland v. Countess of Sutherland, &c.*, 26th March 1777, p. 415.

— (8.) *Vide Superior and Vassal.*

— (9.) *Vide Servitude of Bleaching.*

— (NEGATIVE) (10.) Held that a party pleading the negative prescription must have an interest.—*Wauchope v. York Buildings Co.*, 22d April 1782, p. 595.

PRESENTATION.—*Vide Patronage* (2.)

PROHIBITIONS AGAINST SALES OF ESTATE.—*Vide Entail* (5.)

PROVISIONS TO CHILDREN, (Father's Powers.)—*Vide Marriage Contract* (2.)

— *Vide Entail* (9.)

— *Vide Bonds of Provision* (2.)

— How discharge by one child's provision operates as to the other children. The bonds of provision here, were granted under the father's powers of distribution in the marriage

contract, and therefore effectual to bar the children from further claim, if these were accepted of by them; but not otherwise. Held it not proved that these had been accepted in the present case.—*Sinclair v. Sinclair*, 13th Feb. 1770, p. 199.

PROVING THE TENOR.—Where a bond was challenged as false and forged, and on production being called for in the improbation, and an extract produced to satisfy production. On its being urged that the original bond ought to be produced, it was stated that it was lost in the hands of the Keeper of the Records; a proving of the tenor being made necessary. Held that a special *casus omissionis* was unnecessary, where, in these circumstances, the proof that the original existed was established, both by the extract, and by the decrees in other processes, and where the Keeper of the Record deponed that such bonds had gone amiss in the Register Office on former occasions.—*Earl of Lauderdale v. George MacKay of Skibo*, 21st March 1770, p. 234.

PROOF.—Held that a bill of lading was not evidence of the value and quantities of the goods shipped, so as to entitle the insured to recover according to these values and quantities.—*M-Nair v. Coulter*, 15th February 1773, p. 297.

— *Vide Service* (2.)

— *Vide Usage.*

— *Vide Bill of Lading—Vide Sale*

(11.)—*Vide Insurance* (3.) *Vide Alien*, p. 68.

— *Vide Parole.*

PUBLIC OFFICE.—Held, on the deaths of both the principal Clerks of the Bills, that the office of deputy did not thereby cease and determine, so as to entitle the new principal clerks to appoint other deputies, or to enter into and perform the office of deputy by one of their number, and to uplift the fees belonging to the office.—*Waddell v. Inglis*, 14th February 1770, p. 205.

— A schoolmaster appointed by the Magistrates and Town Council of Campbeltown, without any mention being made as to whether his office was for life or at pleasure. Held that it was a public office, and that he was liable to be dismissed for a

just and reasonable cause, and that acts of cruel chastisement of the boys were a justifiable cause for his dismissal; reversing the judgment of the Court of Session.—*Campbell v. Hastie*, 14th April 1772, p. 277.

**RANKING, PRINCIPLES OF, IN BANKRUPTCY.**—*Vide Society.*

**RATIFICATION.**—Certain deeds having been executed, burdening the estate more than the antenuptial contract stipulated; and the heir having been got to ratify these. Held that the son of this heir was entitled to set these aside, on the ground of his father's facility.—*Dallas v. Dallas*, 4th February 1765, p. 91.

— *Vide Passive Title.*

**REAL BURDENS.**—Circumstances in which provisions to wife and children were held not to have been made real burdens on the estate conveyed.

—*Cameron v. Cameron's Creditors*, 15th May 1781, p. 572.

— *Vide Recal of Factory.*

**RECAL OF GUARANTEE**—*Vide Guarantee (1.)*

—  **IMPLIED OF MANDANT'S POWERS.**

— *Vide Patron.*

— **OF FACTORY.**—Two persons acted in this country as trustees for a person abroad, owner of an entailed estate in Scotland. His previous letters advised them to enter into agreements, in regard to the lead mines on the estate, and that any such, entered into by them, would be affirmed and ratified by him. They entered into an agreement with the appellants, for a lease of the mines of the estate, binding themselves, so soon as powers to that effect arrived from Antigua, to grant them a regular lease. On this agreement possession followed. These powers arrived; but before the regular lease was granted, the owner's affairs became embarrassed, and he sent home his son to Scotland, with powers to raise money on his estate, either by lease, assignation or conveyance of the same; and conferring on him special power to grant deeds to that effect. The son granted a letter agreeing to give a lease of the same mines to other parties. Held, reversing the judgment of the Court of Session, that the second factory was not an implied revocation of the first, but

was to be viewed only as a power to raise money on the estate, and that the trustees' obligation remained good, to grant a lease to the appellants, in terms of the first agreement.

—*Patten v. Carruthers, &c.*, 24th March 1770, p. 238.

**RECORDING ENTAIL.**—*Vide Entail.*

**REDEEMABLE RIGHT.**—*Vide Disposition Absolute, (No. 2.)*

— *Vide Prescription, (7.)*

— *Vide Adjudication, (1.)—Heritable Creditor.*

**RELIEF.**—*Vide Guarantee, (2.)*

**RENTS IN ARREAR AT DEATH OF PREDECESSOR.**—Whether they belong to heir or executor.—*Vide Apparency.*

**RENUNCIATION OF RIGHTS.**—Circumstances in which transaction with predecessor was held to bar the challenge of the heir, though the deed of renunciation, embodying this transaction, was also sought to be reduced; and the heir insisted that he was not bound by his mother's deed, he not representing her, but passing by and claiming right from a more remote predecessor: Also, that *res judicata* barred the action.—*Gordon v. Ogilvie*, 22d March 1762, p. 61.

**RENUNCIATION.**—*Vide Donatio inter virum et uxorem.*

**REMISSIO INJURIA.**—*Vide Divorce.*

**RESERVED FACULTY**—*Vide Faculty Reserved—Postnuptial Contract.*

**RES JUDICATA.**—*Vide Stipend.*

— *Vide Renunciation.*

**RETENTION**—*Vide Bankruptcy (5.)*

**REVOCATION IMPLIED.**—A father executed a settlement in form of an entail, in favour of his eldest son and his heirs male; whom failing, to his second son and his heirs male, &c., but reserved power and faculty to himself, to affect or burden the lands: Held that he was entitled to execute a subsequent disposition of the same estate, in favour of his second son, passing over the eldest son, reversing the judgment of the Court of Session.—*Heron v. Heron*, 31st Jan. 1770, p. 189.

— *Vide Deed, (5.)*

**REVOCATION.**—An entaler had reserved power to himself to alter and revoke the entail executed by him. He thereafter executed a will, conveying the fee of his whole real estate in England and Scotland, ac-

cording to the English form, revoking all "former and other wills;" Held that this latter deed was not effectual as a revocation of the entail.—*Dundases v. Sir Thomas Dundas*, 21st May 1783, p. 618.

**RIGHT IN SECURITY.**—Circumstances in which an absolute right, by conveyance to a certain house, was held to be a right in security.—*Simpson v. M·Millan*, 16th March 1770, p. 227.

**RIVER.**—Held, that the superior heirs in the river Spey, in which the Duke of Gordon had a right of crive fishing, had a right of floating timber down the river, and that the crive dyke built across the river could not be allowed to hurt this right.—*Sir James Grant, &c. v. Duke of Gordon*, 20th Feb. 1782, p. 582.

**SALE.**—(1.) Circumstances in which held, where a purchaser did not find satisfactory security for payment of the price, within the time specified in the minute of sale, though cautioners were offered, but rejected as insufficient, the seller was entitled to sell the property to another.—*Anderson v. Anderson*, 26th Feb. 1759, p. 22.

— (2.) A bargain was entered into for the sale of 100 hogsheads of Philadelphia lintseed, of Messrs. Alexander's importation, for which £4. 4s. per hogshead was agreed to be paid. Instead of this, the seller purchased himself Virginia lintseed of inferior quality at £3. 10s. per hogshead, and sent it to the buyer as the Philadelphia lintseed which he had bargained for. Held, reversing the judgment of the Court of Session, that the buyer was not liable for the price. *Gray and Stewart v. Ogilvy*, 2 March 1770, p. 215.

— (3.) Circumstances in which a sale of houses by auction, was held to be unwarrantable, rigorous, and unfair, from the conduct of the seller, the conduct of the judge, and from the price at which it was sold. *Simson v. M·Millan, &c.*, 10th March 1770, p. 227.

— (4.) Circumstances in which written correspondence in regard to a sale of coal, was not held to amount to a final and conclusive agreement, the parties having stipulated that their agreement was to be a written

agreement, and until this was executed either might resile; affirming the judgment of the Court of Session.—*Alexander v. Montgomery and Co.* — 19th Feb. 1773, p. 300.

— (5.) Circumstances in which held that a purchaser, according to the terms of the sale, was bound to take the title as it stood, or give up the bargain.—*Hepburn v. Aikman*, 30th April 1773, p. 326.

— (6.) *Vide Bankruptcy (6.)—Insolvency.*

— of lands (7.)—The York Buildings Company purchased the forfeited estate of the late Earl Marischall, together with the right of redemption of the wadsets, and superiorities thereof. There were two wadsets on the lands of Clerkhill and Downieshill, being parts of the Marischall estates. The Marischall estates, along with others, were afterwards let on lease to Sir Archibald Grant and Mr. Garden; and they were thereafter ordered to be sold by act of Parliament, as so let on lease. Neither the articles as to the lease, nor the act of Parliament, mentioned any thing about the wadset lands of Clerkhill and Downieshill, although the prepared state and scheme of the rental included them in the computation of the rental and price at which they were to be exposed. The purchaser insisted that they were included, and ought to go into his charter, as the decree of sale conveyed to him "all and haill the late " Earl Marischall's lands in the coun- " ty of Aberdeen, except certain " parts therein mentioned." Held that the right of reversion was not included in the sale, and still belonged to the York Buildings Company.—*York Buildings Co. v Ferguson*, 21st March 1780, p. 541.

— (8.) of Succession.—An agreement was gone into by the residuary legatees in a settlement with the widow of the deceased testator, whereby the latter agreed to purchase their right of succession for a fixed sum, they assigning their interest over to her. Stewart, a neutral party, on behalf of the widow, interposed, and allowed his name to be used in the transaction; and as the estate of the deceased was not then realized, became absolutely bound to pay the

respective sums at which their interest was bought up. Thereafter the widow herself transacted with the beneficiaries, and granted bonds to some of them for the amount, without the interference of Stewart, and she granted time for payment. The widow afterwards fell into poverty, and could not pay. Held that Stewart was still bound, and that he was not released by the new transaction had with the widow herself, as that was a mere bond of corroboration, and did not discharge him.—*Graham and Husband v. Gardners*, 24th April 1780, p. 549.

— (9.) Circumstances in which a sale of stock, in a joint stock copartnery concern was held to be completed so as to free the partner selling his stock from liability for the company debts.—*Craig v. Douglas, Heron and Co.* 17th May 1781, p. 575.

— (10.) *Vide Arrestment* (2.)

— (11.)—Dunlop shipped a cargo of tobacco to his correspondents Hastie and Jamieson in Glasgow, with whom there was a special contract, that the latter should ship in return home goods to Virginia. The bill of lading bore, “that the tobacco “was shipped, on account and risk “of Dunlop, but to be delivered unto “Messrs. Hastie and Jamieson, “merchants in Glasgow, or their “assigns, he or they paying freight.” A few hours after the ship’s arrival at Port Glasgow, a creditor of Dunlop arrested the ship and cargo. Held, reversing the judgment of the Court of Session, that the arrestment did not attach the cargo, and that Hastie and Jamieson had a special property therein.—*Hastie and Jamieson v. Arthur*, 10th April 1770, p. 251.

— (12.) A party sold a vessel to his creditor, under a vendition *ex facie* absolute, but as shewn by the correspondence, was intended as a security for his debt. He thereafter insured his vessel. Held on her loss, that he had still an insurable interest, the sale being merely in security.—*Alston, Elliot and Others v. Campbell & Co.*, 3d March 1779, p. 492.

**SALMON FISHING.**—(1.) A party’s grant of fishing was described as bounded along the shore between certain points therein described ; Held that

this did not exclude another, whose right is prior, though general in its terms, from acquiring possession of part of the fishings within the boundary so marked out and described.—

—*Littlejohn v. Stratton*, 1st Feb. 1759, p. 19.

— (2.) A difference having arisen as to the import of the judgment of the House of Lords fixing the boundary between two fishings, as being the line which the sea made upon the coast where it cut the river Spey; circumstances in which the Court of Session was held entitled to order certain permanent landmarks indicating this line, to be fixed up.—*Duke of Gordon and his Curators v. Earl of Moray and Earl of Fife*, 9th March 1763, p. 78.

— (3.) Act 1696. Held that the Scotch act 1696 against illegal modes of fishing, applied to the salmon fishings on the river Tweed, reversing the judgment of the Court of Session. Question, When a great river divides two kingdoms, are there any real dividing line in the river which determines the rights of fishing ? or is the whole river common to the proprietors on the English and Scotch sides, and how far are these rights of fishing subject to the Scotch statutes and jurisdiction of the Court of Session ?—*Duke of Roxburgh, &c. v. Earl of Home and Earl of Tankerville, &c.* 6th June 1774, p. 358.

— (4.) Held that the act 1771, against illegal modes of fishing, applied to certain engines and pocket nets used in the river Tweed, although the act had no retrospective operation, and the mode of fishing questioned had been for a considerable time practised and established.—*Earl of Tankerville and others v. Duke of Roxburgh and others*, 6th June 1774, p. 365.

**SCHOOLMASTER.**—*Vide Public Office.*

**SERVICE.**—Held (1.) that an heir of the marriage is entitled to reduce a deed executed in fraud of the marriage contract, without expediting a general service. (2.) That such heir is entitled to set aside a general service expedite in his name in minority to his hurt and prejudice, in so far as it made him universally liable for his father’s debts.—*Blair and others v.*

Sir Wm. Moncrieff, Bart. 5th May 1766, p. 126.

— (2.) Archibald Douglas was duly served heir, as lawful son of the deceased Lady Jane Douglas, to the Douglas estates, and the service duly retoured to chancery. Afterwards a reduction was raised of this service by the Duke of Hamilton, on the ground that he was not the son of Lady Jane Douglas: Having in the meautime acquired his status as lawful son of Lady Jane Douglas, not only by the service but also by other acts, which by law conferred that status upon him.—Question, Whether the possession of such status by the service did not throw the *onus probandi* of proving the reverse on the party impugning the service and birth?—*Douglas v. Duke of Hamilton, &c.* 27th Feb. 1769, p. 143.

— *Vide Entail (6.)*

**SERVITUDE OF AQUEDUCTUS.**— (1.) Circumstances in which found, that a party had a right to the run of water, or a servitude of aqueduct, through a neighbour's lands, without any express grant, but as part and pertinent of a mill; and was entitled to access to do all acts to keep it in repair; and had good right to question the acts of the proprietor through whose lands it flowed, in so far as these tended to injure or diminish the flow of water to his mill.—*Pringle v. Duke of Roxburgh, &c.* 2d Feb. 1767, p. 134.

— (2.) A servitude of thirlage cannot be constituted by usage of grinding corn at a particular mill and paying insucken duties, without a written title astriciting the lands to the mill; and though these may have been originally astricted, yet where, by subsequent charters and title, these are freed and released therefrom, this must govern the question. *Coltart v. Frazer, 28th Jan. 1774, p. 332.*

— (3.) There was a thick wall left in working the Niddry coal, which divided the Niddry colliery from the Woolmet colliery, which stood higher up. The wall, consisting of porous coal, did not prevent the water from flowing down from the Woolmet to the Niddry coal. The proprietor of the latter was proceeding to make downsets to prevent

influx of the water, when Sir Arch. Hope brought a suspension, contending that the Niddry coal, being the inferior tenement, and lowerdown, was subjected to a natural servitude of receiving the water that came down from the higher colliery. Held in the Court of Session that Niddry was entitled to make the downsets. On appeal, remitted for consideration. *Wauchope v. Earl of Abercorn, &c.* 21st Feb. 1780, p. 519.

— (4.) Held that a servitude of bleaching linen was a good servitude in law: Also a servitude in favour of the inhabitants of the burgh of Dysart of taking water from the wells in a neighbouring heritor's property for family use; as well as a servitude acquired by immemorial use of a right to a foot road to these wells. Also that the burgh of Dysart, as a corporation, and by the charter of the burgh, had a sufficient title to acquire such servitudes by the mere use and possession of its inhabitants.—*St. Clair v. Magistrates of Dysart, 8th March 1780, p. 554.*

— (5.) OF MINERAL WELL.—A party claimed a servitude over a mineral well in his neighbour's field, which was situated near the mutual fence which divided their properties, and alleged the use and possession thereof for time past the memory of man. The sheriff sustained his claim as a servitude. On advocation the interlocutor was varied so as to leave out any finding as to a servitude. Held in the Court of Session and House of Lords, that he was entitled to the possessory judgment as to the use of the well, and to have access thereto by a stile over the stone wall.—*Waddell v. Russel, 16th Dec. 1781, p. 579.*

**SOCIETY.**—(1.) Held, (1.) that a company are entitled to rank on an individual partner's separate estate *pari passu* with the creditors of that separate estate, for the whole amount of debts owing by the company, after deducting any dividends that may have been paid to the company creditors; but, (2.) Held in the House of Lords, that where, after a dividend on an estate was declared, and most of the creditors paid, a new claim was lodged for the first time on the estate, that

such claim will not be allowed to disturb or affect the dividend paid before any notice was received of such claim ; but that the claimants were entitled to be paid up equal to the other creditors, before the latter receive anymore.—*Speirs, &c. v. Dunlop & Co. &c.*, 9th May 1777, p. 437.

— (2.) *Vide Bill*, (2.)

— (3.) *Vide Copartnery*.

— (4.) Where goods were purchased on individual account, and thereafter an interest purchased therein by another, as part of a cargo shipped for foreign trade ; where also there was no contract and no previous reputed ownership. Circumstances in which held there was an existing copartnery, and that the deceased partner, in purchasing the goods, in ordering the insurances, and in receiving the returns, acted as *præpositus negotiis* of the company, and bound the other partners.—*Cunningham v. Kinnear, &c.* 27th March 1765. p. 114.

**STATUTE.** — Circumstances in which held that the sale of ales was made to evade the statute 28 Geo. II. c. 29, granted in favour of the magistrates of Glasgow, allowing them an impost on all ales brought in from the breweries into Glasgow for consumption.—*Magistrates of Glasgow v Murdoch, Warren & Co.* 9th May 1783, p. 615.

**STATUS, POSSESSION OF, BY WHAT ACTS PROVED.** — *Vide Douglas Cause*.

**STIPEND.** — (1.) Held, though a stipend had been augmented since the Union, there was no law which barred the minister from insisting for a further augmentation. Also that the House of Lords had an appellate jurisdiction in reviewing the judgments of the Lords of Session as Commissioners of Teinds in such questions.—*Rev. Mr. Milligan, minister of Kirkden v. Sir John Wedderburn, &c.* 8th July 1784, p. 621.

— (2.) Held that the Court of Teinds has no jurisdiction to augment the stipend of the ministers, out of any other funds than the tithes of the parish where the minister serves the cure, and, therefore, that they had no jurisdiction to augment the stipends of the ministers within the city of Edinburgh, although there were several funds set apart and de-

voted to the support of the clergy under the control of the magistrates. *Ministers of Edinburgh v. Magistrates of Edinburgh*, 17th Feb. 1766, p. 118.

**SUCCESSION.** — *Vide Adjudication* (2.)

Heirs whatsoever.

— *Vide Revocation* (1.)

— *Vide Heirs*.

**SUPERIOR AND VASSAL.** — *Vide Crown's Patrimony*.

— A charter bound the vassal to deliver thirty bolls of corn yearly, or in his option, 6s. 8d. Scots for each boll as conversion money. The subsequent investitures omitted the option of the conversion money : Held, the superior not entitled to claim the *ipsa corpora* of the victual, but the conversion money only.—*M'Leod and Ross v. Ross*, 5 May 1777, p. 430.

— *Vide Liferenter* (1.)

**TEIND FISH DUTY.** — Circumstances in which held, that the minister of North Leith has by grant a right to teind duty on all fish brought into Newhaven and Leith.—*Dr. Johnstone v. Chalmers, &c.*, 6th April 1781, p. 559.

**TEINDS.** — *Vide Jurisdiction and Valuations*.

**TESTAMENT.** — *Vide Deathbed Deed*.

**TESTING CLAUSE.** — Held that an error in the designation of the writer of the entail appearing in the sasine taken thereon, different from what it was in the entail ; and the name of the procurator to whom the symbols of infestment were delivered, being different from the name of the procurator named in the other parts of the sasine, did not annul the sasine.—*Lord Napier v. Livingstone*, 11th March 1765, p. 108.

— *Vide Wadset*—Signing by Notaries.

— Objection to sasine on account of witnesses not signing each page or leaf, but the last page only of the deed, held not good.—*Vide Entail*, (12.)

**TRANSACTION.** — *Vide Renunciation*.

**TRUST.** — *Vide Disposition Absolute* (1.)

**TUTORIAL.** — (1.) Held, in consequence of a tutor neglecting to give up in his inventory, a lease of dues current at the deceased's death, that he was liable in payment of interest of these, from the dates at which they were respectively paid, and this, notwithstanding

standing a discharge being granted for £889, as the sum affeiring to the minor's interest therein, in full satisfaction of all claims on that account, the minor having been kept ignorant of the claim and the state of the account. (2.) Held for the same reasons, that the curator was not entitled to charge any commission for his trouble. (3.) Held that a curator, who had himself been a partner along with the deceased, in the said lease current at his death, was not bound, on expiry of the same, to take a renewal also in the pupil's name; but entitled to procure that renewal in his own individual name, the pupil having then attained full age, and the curatory expired.—*Parkhill v. Chalmers, &c.*, 12th February 1773, p. 291.

— EXPIRY OF.—*Vide Deed* (3.)

**UNION.—DISPENSING CLAUSE** (1.)— Objections were stated to a sasine, on the ground that it was not taken on the several tenements of lands, these, although originally united by a clause of union, being now discontiguous, and the union dissolved by a sale of part. Held in the House of Lords, that the usage of granting dispensation clauses, allowing sasine to be taken on a part for the whole, was material, if established in this case; but appeal dismissed, in consequence of no evidence of the usage being adduced.—*Lyall v. Skene, &c.* 9th Feb. 1768.

— (2.) Held, reversing the judgment of the Court of Session, that where parts of lands were conveyed by a party, whose charter contained a dispensation clause, authorizing infestment to be taken on a part for the whole, that the benefit of this dispensation clause is not lost to the parts alienated when the conveyance is merely for life, to revert then to the granter, and that the infestment taken on part was good for the whole.—*Ogilvie v. Skene and Hunter*, 4th March, 1768, p. 141.

**USAGE.—*Vide Teind Fish.***

— *Vide Union*, (1.)

**VALUATIONS, RATIFICATION OF.**—The tithes of a parish were valued, but the decret of valuation was lost, and the only evidence was an old book,

containing the valuation of the sub-commissioner of Teinds, not ratified by the chief commissioners. Held it competent for the Teind Court, at the distance of a hundred years, to ratify the report of the old valuation of the sub-commissioners.—*His Majesty's Advocate v. Duke of Montrose and others*, 15th March 1758, p. 15.

**VALUED OR OPEN POLICY.—*Vide Insurance*, (3.)**

**VESTING.—*Vide Legacy.***

**WADSET.—A contract of wadset having been executed by the aid of a notary.** Held, that as it was executed by the aid of only one notary and two witnesses, in place of two notaries and four witnesses, it was bad.—*Sutherland v. Countess of Sutherland*, 26th March 1777, p. 415.

— *Vide Prescription.*

**WILL.—Circumstances in which held, that a deed declaring an intention to settle £16,000, sustained as a binding obligation on the heir, although this intention was not followed out by the actual execution of the settlement.**—*Duke of Queensberry v. Sir William Douglas, Bart.*, 30th April 1783, p. 603.

**WITNESS NECESSARY.—Held, reversing the judgment of the Court of Session, that the writer or agent who prepared the deed challenged, and who was an instrumentary witness, is not, when adduced to prove the capacity of the maker of the deed, at the time he executed it, an incompetent witness.**—*M'Clatchie v. Brand or Burnet*, 22 Mar. 1773, p. 312.

— (2.) Held, that an agent who prepares and sees a deed executed, and signs as an instrumentary witness, and when this deed is challenged on the head of incapacity, who writes into the Edinburgh attorney with instructions to defend the cause, is not inadmissible on the ground of partial counsel.—Same case as above.

— (3.) Circumstances in which objection to examination of witness, on the ground of interest, not sustained.—*Hewit v. Elliot, &c.*, 6th Dec. 1775, p. 381.

— (4.) Objection to a witness, as having been tutored, and as having perused the papers, &c., in the cause repelled.—Same case as above.

## APPENDIX.

NOTES OF LORD CHANCELLOR HARDWICKE,  
TAKEN OF THE ARGUMENT OF COUNSEL, &c., IN CASES FOMERLY  
REPORTED.

### JAMES CATTANACH ET ALII v. GORDON.

*Vide* Craigie and Stewart, p. 401.

*Mr. Hume Campell for Appellant.*

1. That the appellant is duly qualified.
  2. If he was not, yet respondent was not duly elected ; but the utmost consequence to be drawn from it is, that the election is void.
- The qualifications required are, either, 1st, A doctor ; or, 2d, *Licentiatus "cum rigore examinis."*

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The first speaks of an academical degree. The second imports it : for there was no such thing as a college of advocates, or Court of Session *there*.

Sufficient to know, that if it were open at law to the Faculty of Advocates to be capable, it could not be, without making a monopoly to themselves.

1. Obj. That the appellant's degree was taken eight days before, in fraud of the statute or charter.

Ans. Frequent to take up such degrees, when they are wanted for qualification.

*This was "cum rigore examinis."*

2d Obj. That the Marischal College of Aberdeen has not power to confer degrees.

Ans. All the universities in Scotland, generally called *Colleges*, have such power.

Not disputed ; but they have a power of giving a degree of Master of Arts.

There can be no difference as to the authority.

As to the respondent's qualifications.

The admission of the Faculty of Advocates, is *in order to serve as an advocate at the bar of the Court of Session.*

2d Point.

Impossible to say, that for the want of qualification in the appellant, the respondent is to be duly elected by a minority of votes.

*Extract of Procedure, &c.*

Principal's protest.

Answer.

Reply by way of protest, that *there is no Professor of Law in the College* : That their power of conferring such degrees has never been ascertained ; but is still disputed and denied.

*Mr. Erskine ad idem.*

1. It is not a point in question which of the two parties is in fact duly elected.

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2. The Court of Session has proceeded regularly.
3. The electors are made judges of the point, otherwise there will be no such thing as an election.

Then the merits of this case lie in a very narrow compass.

1. What is the characteristic required?

That the professor should be either a Doctor of Laws, or Licentiate *cum rigore examinis*.

Objected—

1. That he has not a degree from a university having power to confer such a degree.

2. If he has a degree, yet he has not obtained it in a proper manner.

Power is given to them *honoros gradus Academicos conferendi*.

*Linnaeus de jure Publico*, Vol. iii. lib. 8, c. . De Universitatibus, where “ Academicus” appears—afterwards called University and Collegium very probably.

*Obj.* No Professor of Law at time of election.

*Ans.* At Cambridge no Professor of Music: Degrees in music conferred.

*Linnaeus “ De Universitatibus.”*

A man may be admitted an advocate in the Court of Session, though he knows nothing of civil law, and is examined only in the municipal law of Scotland—a writer to the Signet in like manner.

2 Parl. Chap. ii. c. 20. Act of employing vacant stipends.

The vacant stipends of Aberdeen, &c. to the Universities of Aberdeen. Skinner, 485. Phillips and Bing.

*Lord Advocate for Respondent.*

Four questions.

1. Whether respondent, by his admission as an advocate, is in a position of being elected?

2. Whether the appellant, Mr. Cattanach, is qualified?

3. Whether, in consequence, the election is void? or,

4. Mr. Hamilton Gordon duly elected?

1. Impossible, as affairs are situated in Scotland, to comply with the very words of the statute:—

*No professorship of the Civil Law in any of the universities of Scotland after the Reformation, till of very late years.*

*Now one founded in Edinburgh and Glasgow.*

The question is, What is the equivalent for it? *There has been no advocate admitted since the Union, but upon a trial in Civil Law.*

The election at Aberdeen has followed this; but,

2. As to Mr. Cattanach's qualification, this was an apprenticeship to a procurator at Aberdeen.

About nine days before the election he obtained his Doctor's degree.

*As to a diploma, 'tis but an honorary degree per saltum.*

The college was erected by a subject, to teach the liberal arts—philosophy, &c.—not for *Divinity, Law, or Physic*.

The conferring degrees is *in regula majore*.

The conferring it by Parliament would not make it broader than it was in itself.

As it was founded to teach the liberal arts, it may confer degrees in those arts.

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CATTANACH  
v.  
GORDON.

*No instance of a Doctor of Civil Law in the College till 1727.*

\* No degree in Scotland in divinity but what are conferred by the presbytery.

3d Point. Whether election void? Where there is a *jus devolutum* this can't be, wherever an incapable person is chosen.

*In corporate elections. if a majority vote for an unqualified person, the person voted for by the minority is elected.*

*Mr. Solicitor Grant ad idem.*

Three general questions.

1. Whether the appellant qualified within the statute and intention of the founder?

2. Whether the respondent capable, according to the present circumstances, in Scotland?

3. Suppose the appellant not capable, and the respondent capable, what will be the consequence of voiding part of this election?

1. As to first—

The foundation of the Marischal College in 1494.

A preference is first given to this College; next, to the University of Aberdeen; lastly, to be of some other university.

The electors did not examine the merits or learning of either of the candidates.

The sovereign may confer power of giving degrees either in part or in whole.

The Marischal College founded by the Earl Marischal, after the Reformation, for the promotion of the liberal arts.

*Nothing, however, of their conferring a degree in the civil law in 1727.*

2. Act of 1 Parl. Chas. II., c. 4, puts the new College of Aberdeen upon the same footing with the College of Edinburgh.

2d Point. Whether respondent capable?

If there is no such degree now in Scotland as Doctor, nor beyond that of Master of Arts, then the question is, how the intention of the founder is to be complied with?

It is to be proved.

By the practice in Scotland, a minister ordained and allowed, is admitted to them (i. e. degrees of Doctors in Law) in the place of a Doctor in Divinity.

3d Point. Whether the respondent being capable, and the appellant incapable, the respondent is elected, though by a minority?

If the 13 had voted for different persons, the respondent would have been elected.

*If the 13 had refused to vote at all, the four would have } Notice.  
been the majority.*

*Suppose vote for a person not elected by a leet, or not an alderman.*  
*Case of Fellows of University College.*

How is a devolution?

DUKE OF  
ROXBURGH  
v.  
JEFFRAY, &c.

*Respondent is a member of the old University of Aberdeen; appellant not a member of either, or of any other university.*

*Mr. Hume Campbell (expt.)*

*Kelso Case.—DUKE OF ROXBURGH v. JEFFRAY and Others.*

*House of Lords, 18th March 1757.*

*Craigie and Stewart, p. 632.*

*Lord Advocate for Appellant.*

No attempt by appellant to prevent the respondents from exercising their trades.

The question is, Whether they are a corporation having an exclusive right? or,

1. Whether the burgh of Kelso is a body politic or corporate?
2. Whether said several societies are also incorporations, with perpetual succession?

1. Creation of burghs of barony is in favour of the baron.

All the powers are constituted in the family of Roxburgh.

2. Suppose a burgh of barony and the burgesses are a corporation, yet it does not follow that these corporations have exclusive privileges.

The power is given to the family of Roxburgh to admit all the several kinds of tradesmen.

These societies have no seal of cause, i. e. patent or instrument of erection.

3. As to customs.

Have directed the Duke to account.

1. The charter 1607 cum ad usos rusticos burgi ad applicandi.  
Not in the contract.

This is discharged by charter 1614 and 1634.

2. Suppose the burgh had anciently a right, it is barred by prescription.

Act 22 James VI. anent prescriptions. This relates to the positive prescription.

We are equally entitled to the positive prescription.

Obj. That part of the duties are now so applied.

Ans. The Duke of Roxburgh only allowed the profits of the spoon and ladle for the salary of his bailiff.

No interruption.

No document has been taken.

3. As to customs which were now vested in Learmont and Heatly.  
Those were the common and petty customs.

4. As to the island.

The whitening of linen—there was only a tolerance.

Nothing like a servitude in law.

*The words of the charter 1647. The non obtenando, &c.*

Those words are also in the charter 1634, so ought not to be applied to the construction they make.

28th Sept. 1634. The contract on which the charter of 1634 proceeded.

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DUKE OF  
ROXBURGH  
v.  
JEFFRAY, &c.

1646. Regulations made by Robert Earl of Roxburgh.

Averment that the town-council are only stentmasters.

The duties which are now in Learmont and Heatly are of the value of £20 per annum.

*Mr. Solicitor-General ad idem.*

Two questions.

1. On the exclusive privileges claimed.
2. On the duties of which the appellants claim the application *ad communum bonorum dicti burgi*.

By the law of England, exclusive privileges of trade cannot arise by charter of the crown; but may by prescription.

The articles of Union give a communication of privileges of trade.

1. Whether the burgh itself is a corporation?
2. If so, whether the subaltern companies are corporations?
3. Suppose both these against us, yet whether these corporations are entitled to exclusive privileges?

In a royal burgh the corporation is immediately erected by the crown.

The burghs are the grantees.

In a *burgh of barony* the baron is the grantee, and the inhabitants the burgh.

The words relied upon by the respondents don't create a grant to *the inhabitants*.

No entry of an admission either after the grant, or in any subsequent time.

The grant is made for the benefit of the baron.

The inhabitants have gone on exercising powers of buying and selling.

2. As to the companies of trades. The great distinction is between *fraternities* and *corporations*.

Fraternities are voluntary societies, exist in many corporations, and have power to make regulations for the governing of themselves, but not to bind strangers.

No seals of cause appear, nor any presumption of them.

There may be fraternities with deacons; but not thence a body politic.

Case of Burntisland, in Stair's Decisions, vol. ii. p. 837.

I hold that such offices and regulations might subsist without a grant.

*Obj.* That the regulations speak as if an incorporation.

*Ans.* They all contain powers of revocation.

I agree, if there had been an express clause of incorporation, the clause of revocation would have been void.

Therefore this shows intent not to erect an incorporation.

*Obj.* That these words are not in the contract of 1634.

DUKE OF  
ROXBURGH  
*v.*  
JEFFRAY, &c.

*Ans.* More probable that the mistake was made in the contract than in the charter, which is the most solemn act.

If a mistake in the contract, proper to set it right in the charter.

The charter 1647 must be taken to have followed it. The charter 1614 was the original investiture.

*If, on failure of issue male, the estate had devolved to the Crown, the fairs and markets and customs would have continued, and been payable and applicable to the benefit of the town.*

Abbot of Strat.—March's Case, Coke.

3d Point. Whether any prescription, either positive or negative, runs against this demand?

There is no prescription between a trustee and his *cestui que* trust.

*Part of the customs have been so applied.*

4th Point. A division of these customs. Those in Learmont and Heatly. Before the creation, the abbot could have no customs of fairs or markets. No market and fair then custom.

*But this question is reserved by the last interlocutor.*

Diligence is granted and remitted to the Lord Ordinary.

5th Point. The sand bank called an island. We say it is a *pertinent*.—We have a right to whiten and dry our linen by prescription.

This is grounded on the appellant's admission.

*Copy of a grant to the Weavers of Kelso, 1580, by the Baron of Regality.*

To have a Deacon.

1646. Regulations made by the consent of the Duke of Roxburgh.

1720. Presentation of a schoolmaster by the Duke of Roxburgh, with the consent of the Town Council.

*Declaring it to be for the good of the corporation.*

3d Feb. 1750.

Regulations by the Duke of Roxburgh, concerning the deacons and conveners of the trades.

*Mr. Wedderburn.*

The usage makes the constitution of every particular burgh.

2. Macdowall, 547, B. iv. Setts or constitutions of burgh either by usage or ordinances of the convention of burghs.

Parl. 1469.—Act 4.

1424.—Act 39.

*Objects to the new regulations made by the late Duke of Roxburgh and his bailies, as vesting too great powers in a Baron-bailie.*

2d Point. *As to the customs.*

The act about the positive prescription don't apply to this case,

2 Macdowal, 163. Prescription.

*Lord Advocate, (Rep.)*

1 Macdowal. Definition of a coporation. If they are fraternities, no doubt can exist. But if they are incorporations they may make bye-laws of their own, without the concurrence of the lord.

*Vide the Scotch acts relating to deacons, and Sir Geo Mackenzie's objections thereon. Case in Lord Stair, Nov. 22, 1677.*

Negative Prescription, K. Ja. III. Parl. 5, act 28. Positive Prescription K. Ja. VI. Parl. 22, act 12.

*4. If all these against us, the exclusive privileges cannot be supported.*

Even the baron had not the power to give such exclusive privileges, for the charter gives the Earl of Roxburgh no such powers.

If the Court allow them to be an incorporation, yet they ought to have made a declaration against the exclusive privileges.

As to customs.

1. Whether they are a trust or free ?
2. Whether the action to recover them is not prescribed ?
3. Whether a distinction ought not to have been made between the old duties and the new duties ?

1. If there was a trust, *it could affect only the limitation of the grant of 1634 to the Earl of Roxburgh, and the heirs male of his body.*

Not the limitation in 1647, to the *heirs and assigns whatsoever.*

The trust could not exceed the limitation of the grants wherein it is contained.

2. As to Prescription.—By the law of England, I admit that trusts are out of the statute of limitations.

No such distinction in Scotland.

*Mr. Forrester for Resps.*

1614. The town of Kelso is erected into a burgh of barony *per rerba de presenti. And grants thereby made Incolis ejusdem Burgi.*

Prescription in Scotland is different from England. In England, it must be from time immemorial. In Scotland, 40 years is sufficient,—therefore consistent with the grant.

1. As to the subaltern incorporations.

*The attempt by the Duke of Roxburgh was to rescind solemn acts of his ancestors.*

*We don't assert an independency of the law.*

*He may make regulations.*

*But the attempt here is to extinguish and annihilate these companies.*

The incorporations of the burgh could only be by the Crown.

After that, the baron could create these subaltern companies of merchants and trades.

This appears by the regulations of 1646.—made perfect by possession.

*These companies are not exclusive companies in their own nature; but that arises by laws made by the companies, approved and confirmed by the Duke's ancestors.*

This bye-law. (alluding to a particular bye-law), was confirmed by the Court of Session in Yool's cause.

*The interlocutors don't meddle with the exclusive privileges. Declaring them to be incorporations, don't import it.*

1. *Obj.* That the Duke of Roxburgh has never admitted freemen to the burgh.

*Ans.* But he has ordained regulations for their admission.

2. *Obj.* That the regulations are alterable and revokeable.

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DUKE OF  
ROXBURGH  
v.  
JEFFRAY, &c.

*Ans.* So they are; but not the companies trading.

3. *Obj.* *That the restraint of these trades could not be made by bye-laws.*

*Ans.* Those charters could not be worded in any other way.  
Except in royal burghs, or burghs of barony.

1 and 2 Macdowal, 563.

Not in the power of the lord to rescind them.

*Obj.* The town council not warranted by any of the powers.

*Ans.* 1726. An act for appointing shoemakers and wrights, passed by John, Duke of Roxburgh, *acknowledges the town council.*

Many other acts of the same kind since 1646.

2d Point. As to customs.

Under the two first charters, the Earls of Roxburgh were only trustees for the burgh.

#### LORD CHANCELLOR HARDWICKE'S NOTE.

1. No decision in the interlocutors or decree, concerning the town being a corporation.

2. Nor whether the free burgesses or members of the companies have an exclusive right of trading.

tho' in the libel.

But the first is implied, in the decision that the companies of merchants and trades are incorporations.

And the second is neither expressed nor implied, but left to the general rule of law.

The questions are,

1. Upon the claim of those companies or societies to be incorporations.

2. As to the powers of the baron or his bailie over them.

3. As to the customs and duties of the fairs and markets.

1. A clear trust in charter of 1614, and the charter of 1634.

This upon an estate tail.

2. No trust expressed in the charter 1647.

3. No evidence of any application of customs to the use of the burgh. Spoon and ladle goes a great way. Strange not to decree what might be the ground of it.

1. The grant of the in 1647, new estate.

2. Those were customs existing before this erection.

Learmont and Heatley.

3. The positive prescription, by the act Ja. VI. cap. 12.

4. The privilege of bleaching and whitening their linen on the little island in the Tweed, called Ana or Sand-bed.

*The fact now is, that it was done for a considerable time by tolerance of the defender and his doers.*

*Negative Prescription*, K. Ja. III., Parl. 5, act 28.

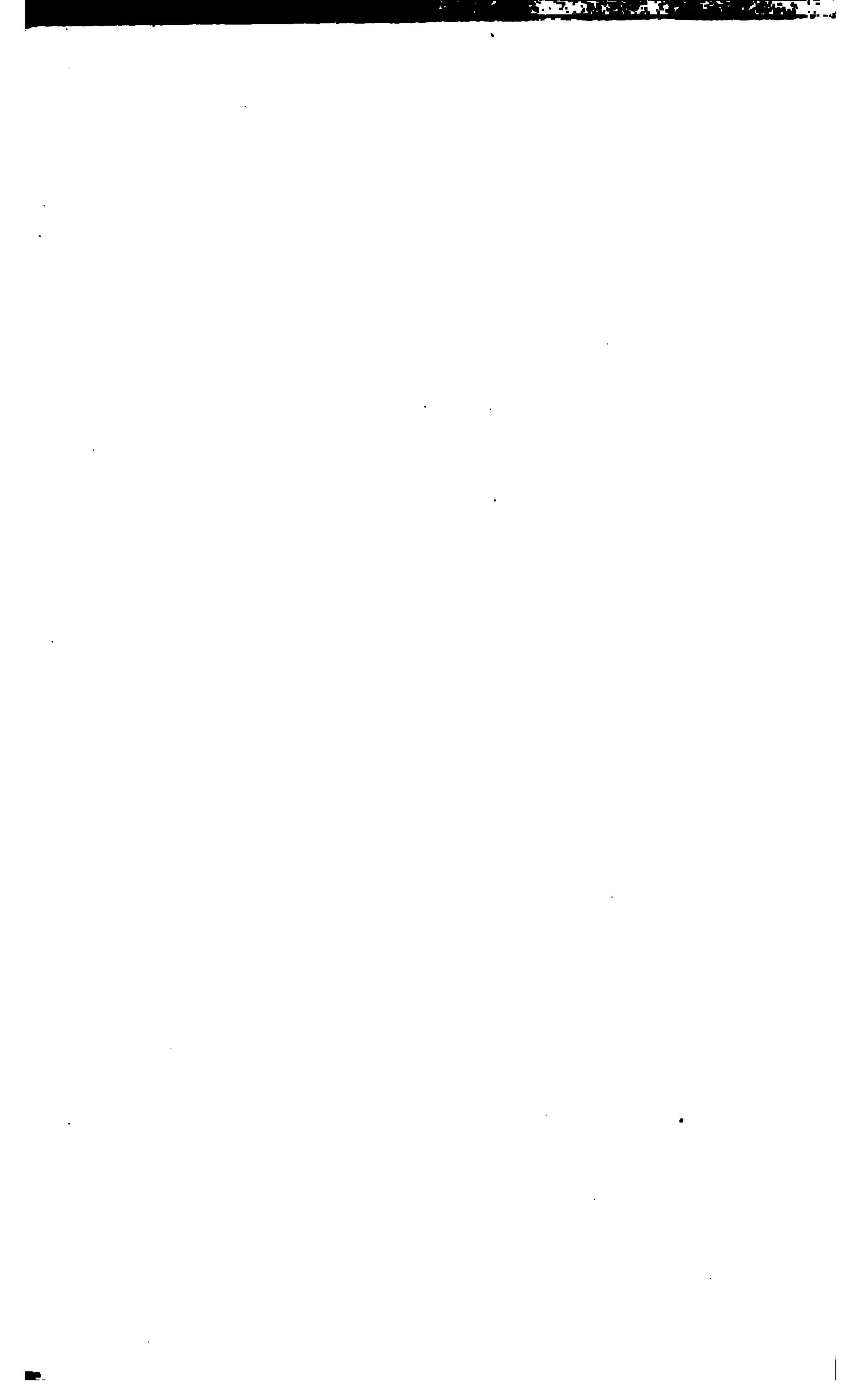
*Positive Prescription*, K. Ja. VI., Parl. 22, act. 12.

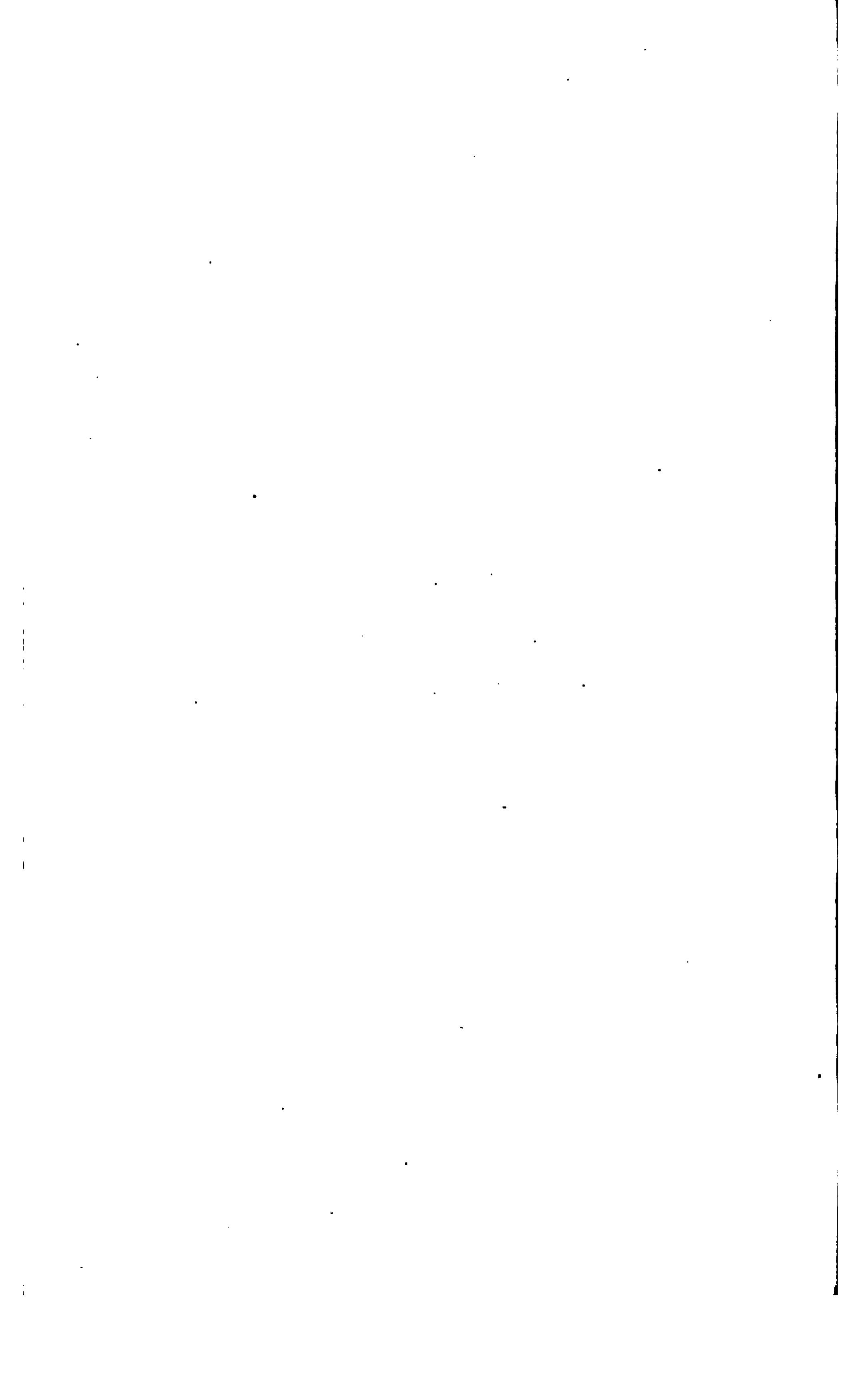
Q. 1st, Whether the issue male of Robert Earl of Roxburgh, the first granter, failed?

2. Whether they have any objection to continuing the usage of whitening and bleaching in the island or sand-bed?









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